SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
APR 16 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1588

SEARS, ROEBUCK AND CO.,

AND

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO.,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

AND

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Of Counsel:
ALAN RAYWID,
COLE, ZYLSTRA & RAYWID,
2011 Eye Street, N. W.,
Washington, D. C. 20006,

LAWRENCE M. COHEN,
LEDERER, FOX & GROVE,
111 West Washington Street,
Chicago, Illinois 60602,

D. J. SULLIVAN,
LEWIS, RICE, TUCKER,
ALLEN & CHUBB,
1555 Railway Exch. Bldg.,
611 Olive Street,
St. Louis, Missouri 63101,

GERALD TOCKMAN,
1153 Pierre Laclede Building,
7701 Forsythe Boulevard,
St. Louis, Missouri 63105.

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
Attorney for Petitioner, Sears, Roebuck and Co.

JERRY KRONENBERG,
MURRAY F. BAHM,
BOROVSKY, EHRLICH & KRONENBERG,
120 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Petitioners, Terminal Freight Cooperative Association and Terminal Freight Handling Company.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Statute Involved 3

Statement of the Case 4

Reasons for Granting the Writ 10

Introductory 10

A. The Right of Charging Parties to Function as "Parties" in Proceedings Arising Under Section 10(l) Is a Product of Congressional Intent as Evidenced by the Legislative History, the Statutory Scheme and Decided Authority of This Court 14

1. Analysis of the Legislative History Establishes Congressional Intent That Charging Parties Be Granted "Party" Status in Proceedings Under Section 10(l) 15

2. The Scheme of the National Labor Relations Act Evidences Congress' Intent That Charging Parties Constitute "Parties" in Proceedings Under Section 10(l) 19

a. Participation by the Charging Party .. 21

b. Recognition of the Interests of the Charging Party 22

c. Congressional Intent as Revealed in a Comparison Between the Language of Sections 10(j) and 10(l) of the Act ... 25

B. Whether or Not Charging Parties Are Conferred "Party" Status Under Section 10(l), They Have a Right to Intervene in All Proceedings Related Thereto 27

1. The Right of Charging Parties to Function as "Parties" Under Section 10(l) Through Intervention Is Established by Analogy to Their Standing to Secure Appellate Review 27
2. Charging Parties' Right to Intervene in Proceedings Under Section 10(l) Also Derives from This Court's Decision in U. A. W. v. Scofield (Fafnir Bearing Co.) 33
3. The Authorities 36

Conclusion 42

INDEX OF AUTHORITIES CITED.

Cases.

Albrecht v. N. L. R. B., 181 F. 2d 652 (CA 7, 1950) 21
Alexander Sprunt & Son, Inc. v. United States, 28 U. S. 249 (1930) 29
American Communications Association v. U. S., 298 F. 2d 648, 50-1 (CA 2, 1962) 33
Arnold Tours v. Camp, 91 S. Ct. 158 (1970) ..11, 22, 28, 41
Ashbacker v. F. C. C., 326 U. S. 327 33
Association of Data Processing Service Organizations, Inc. v. Camp, 397 U. S. 150 .....14, 28, 29, 33, 41
Barlow v. Collins, 397 U. S. 159 .....14, 28, 29, 33, 41
Chicago Junction Case, 264 U. S. 258 (1924) 29
David v. Hotel and Restaurant Employees and Bartenders International Union, et al. (D. C. Okla., No. 66-68) 1966 37
Gleeson v. Carr, 219 F. 2d 64, 67 (CA 9, 1955), cert. den. 350 U. S. 827 33
Henderson v. International Union of Operating Engineers, et al., 420 F. 2d 802 (CA 9, 1969) 36

Houston Insulation Contractors Assn. v. N. L. R. B., 339 F. 2d 868 (CA 5, 1964) 11, 14, 36

In re Keystone Realty Holding Co., 117 F. 2d 1003, 1005 (CA 3, 1941) 33

International Union of Mine, Mill and Smelter Workers v. Eagle-Picher Mining & Smelting Co., 325 U. S. 335 33

The Los Angeles Herald Examiner, et al. v. Kennedy, 91 S. Ct. 12 (1970) 8, 12, 13

McLeod v. General Electric Co., 366 F. 2d 847 (CA 2, 1966) 14, 37

N. L. R. B. v. Plasterers Local Union No. 79, et al. (No. 1183, Oct. Term, 1970) 12

National Welfare Rights Organization, et al. v. Finch, et al., (Nos. 23,787, 23,890, CA DC, decided June 9, 1970), slip opinion, pp. 13-14 ..... 27, 28, 30, 33

Penello v. Plumbers Local Union No. 5, 41 LRRM 2269 (D. C. Va., 1957) 37

Retail Clerks Union v. Food Employers Council, 351 F. 2d 525 (CA 9, 1965) 10, 14, 35, 37, 38, 40, 41

San Francisco-Oakland Newspaper Guild, et al. v. Kennedy, 393 U. S. 926, 404 F. 2d 37 (CA 9, 1968) 12, 36, 37

Scripps-Howard Radio, Inc v. F. C. C., 316 U. S. 4, 11 14

Sears, Roebuck and Co. v. Carpet Layers Local, 410 F. 2d 1148 (1969) 15

Sears, Roebuck and Co. v. Local 419, Carpet Layers, 397 U. S. 655 .... 12, 13, 33

Solien v. International Printing Pressmen, et al., ... F. 2d ....., 76 LRRM 1094 (CA 7, 1970)..... 11

Terminal Freight Cooperative Association, et al. v. Samoff, 90 S. Ct. 2171 (1970)..... 12

United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 283 v. Scofield, et al.; United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, et al. v. Fafnir Bearing Company, et al., 382 U. S. 205 ..... 10, 14, 21, 22, 28, 33, 34, 35, 36, 37, 38, 41

United Steelworkers v. N. L. R. B., 376 U. S. 492 33

Statutes.

Administrative Procedure Act, 80 Stat. 392:
Sections 701, et seq. 28
Section 702 28

Judicial Review Act, 5 U. S. C.:
Sections 103-42 24
Section 1038 24

National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, 29 U. S. C., Section 151, et seq.:
Section 8(b)(4), 29 U. S. C. Section 158(b)(4) ... 19
Section 8(b)(4)(i)(ii)(B), 29 U. S. C. Section 158(b)(4)(i)(ii)(B) 4
Section 8(b)(4)(B), 29 U. S. C. Section 158(b)(4)(B) 4
Section 8(b)(7), 29 U. S. C. Section 158(b)(7) ... 19
Section 10(b), 29 U. S. C. Section 160(b) 21
Section 10(c), 29 U. S. C. Section 160(c) 8
Section 10(f), 29 U. S. C. Section 160(f) 10, 20, 21
Section 10(j), 29 U. S. C. Section 160(j) 23, 25, 26
Section 10(k), 29 U. S. C. Section 160(k) 12
Section 10(l), 29 U. S. C. Section 160(l) .....
.....2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15,
.....18, 19, 20, 22, 23, 24, 25, 26, 27, 29, 30,
.....31, 32, 33, 34, 35, 36, 37, 38, 39, 40

Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. Sections 101-15 15

Miscellaneous.

92 Cong. Rec. 5929 16
92 Cong. Rec. 5946 16
92 Cong. Rec. 6674 16
92 Cong. Rec. 6678 16
93 Cong. Rec. 4844 17
Federal Rules of Civil Procedure:
Rule 24(a)(2) 35, 36
National Labor Relations Board Rules and Regulations and Statement of Procedure, Series 8, as Amended:
Section 102.8 21
Section 102.46(a) 21
Section 102.48(d) 21
Thirty-Third Annual Report of the National Labor Relations Board, pp. 155-156 37
I Davis, Administrative Law Treatise, Section 8.11 at 564 (1958) 27, 33
Jaffe, Judicial Control of Administrative Action, p. 545 (1965) 34
Jaffe, Standing Again, 84 Harv. L. Rev. 633 (1970) .. 29

INDEX TO APPENDICES.

PAGE

Petition for Injunction Under Section 10(l) of the National Labor Relations Act, as Amended, Dated June 29, 1970 ..... A1

Sears, Roebuck and Co. Entry of Appearance, Dated June 30, 1970 ..... A16

Motion of Sears, Roebuck and Co. to Accept Its Entry of Appearance or, in the Alternative, to Intervene, Dated July 1, 1970 ..... A18

Terminal Freight Handling Company and Terminal Freight Cooperative Association Motion to Appear and Participate as Full Parties Litigant, Dated July 1, 1970 ..... A20

Order Consolidating Cases, Complaint and Notice of Hearing, Dated July 2, 1970 ..... A23

Order of the United States District Court for the Eastern District of Missouri, Eastern Division, Dated July 8, 1970 ..... A33

Stipulation Executed by and Between the Regional Director and Respondent Union, Without Participation by or Signature of Charging Parties, and Approved and So Ordered by the United States District Court for the Eastern District of Missouri, Eastern Division, Dated July 9, 1970 ..... A35

Notice of Appeal—Sears, Roebuck and Co., Dated July 10, 1970 ..... A39

Notice of Appeal—Terminal Freight Handling Company and Terminal Freight Cooperative Association, Dated July 16, 1970 ..... A41

Opinion and Judgment of the U. S. Court of Appeals for the Eighth Circuit, Issued March 12, 1971..... A43

Motion of Sears, Roebuck and Co. and Terminal Freight Handling Company and Terminal Freight Cooperative Association to Stay Submission of Settlement Agreement or, Alternatively, to Stay Processing of Settlement Agreement, Dated March 26, 1971 ..... A59

Motion of Sears, Roebuck and Co. and Terminal Freight Handling Company and Terminal Freight Cooperative Association to Toll Time to File Further Statement in Support of Objections to Settlement Stipulation, Dated March 26, 1971..... A66

Letter of Sears, Roebuck and Co. to the Board Confirming Agreement of the Board to Extend Time for Filing of Statement in Support of Charging Parties' Objections to Settlement Agreement, Dated April 6, 1971 ..... A68

Statute Involved A70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. .....

SEARS, ROEBUCK AND CO.,

AND

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO.,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

AND

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners, Sears, Roebuck and Co., Terminal Freight Cooperative Association and Terminal Freight Handling Co., charging parties before the National Labor Relations Board, seek a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit, issued in this case on March 12, 1971. That decision, dismissing petitioners' appeal from the District Court for the

Eastern District of Missouri's refusal to grant the charging parties either the right to appear and participate as full party-litigants in that court, in a proceeding brought under Section 10(l) of the National Labor Relations Act (29 U. S. C. Section 160(l)) or the right to intervene therein, was premised (i) on the lack of legislative support for according charging parties full party status and (ii) on the ground that petitioners lacked standing before the District Court in proceedings under Section 10(l).

OPINIONS BELOW.

The opinion of the Court of Appeals dismissing petitioners' appeal (App. 43), is reported at ..... F. 2d ....., 76 LRRM 2780.

The unreported Order and Decision of the District Court, from which Appeal was taken, issued on July 8, 1970 (App. 33).

JURISDICTION.

The opinion and judgment of the Court of Appeals dismissing petitioners' appeal were filed and entered on March 12, 1971.

The jurisdiction of this Court to review the Court of Appeals' dismissal of petitioners' appeal is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

(1) Whether charging parties before the National Labor Relations Board, whose charges give rise to the mandatory filing of the Regional Director's petition for injunctive relief under Section 10(l) of the National Labor Relations Act, possess the status of "parties" in the ensuing district court proceedings initiated by the Regional Director pursuant to their charges and on their behalf?

(2) Whether such charging parties are intervenors of right in the district court proceedings brought pursuant to Section 10(l) of the Act and which result from the filing of their charges with the Board.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, Section 61 Stat. 136, 73 Stat. 519, 29 U. S. C. Section 151 *et seq.*, are set forth at App. 70,

STATEMENT OF THE CASE.

This case originated from charges filed with the Board by petitioners herein, alleging that Respondent union had violated their rights by subjecting them to unlawful secondary boycott activity proscribed by Section 8(b)(4)(i)(ii)(B) of the Act, 29 U. S. C. Section 158(b)(4)(i)(ii)(B).

The union commenced its picketing of Sears on June 9, 1970, and of Terminal[1] on June 10, resulting in the aforementioned charges filed by Sears on June 10, and by Terminal, on June 12, 1970. Following a preliminary investigation of the merits of these charges, as is required by Section 10(l) of the Act, Respondent Joseph Solien, Regional Director of the Board, on June 16, 1970, concluded that there existed reasonable cause to believe that Respondent union was engaging in unfair labor practices, as charged, and that complaints of the Board should issue.

Although the terms of Section 10(l) explicitly provide that, upon making the described findings, the Regional Director "shall" petition a district court for injunctive relief, the Director ignored this mandatory direction and refused to seek such relief pending the conclusion of his unilateral settlement negotiations with Respondent union.

1. Petitioner Terminal Freight Cooperative Association is a non-profit shippers' association consisting of forty-five independent companies which receives less-than-carload and less-than-truckload shipments, consolidates such shipments into carload lots in order to secure the advantages of lower costs through large volume shipment, and reships such goods to members' plants at locations throughout the United States. Petitioner Terminal Freight Handling Company is a non-profit Delaware corporation engaged in the handling, consolidation and trans-shipment of freight as manager of the Association at more than forty terminals throughout the United States. For ease of reference these petitioners jointly will be referred to as "Terminal" herein.

Since the petitioners continued to be subjected to Respondent union's picketing, and since the Director persisted in his refusal to seek injunctive relief on their behalf, contrary to the express dictates of Section 10(l), petitioners Sears and Terminal, on June 18, and June 19, 1970, respectively, filed a Complaint for Mandatory Injunction in the district court seeking to compel the Director to honor his statutory duty. This constituted only the first of a series of legal actions which petitioners, as aggrieved charging parties before the Board, were forced to institute as a result of this unlawful picketing, in order both to perfect and to protect their statutorily guaranteed rights. The instant petition constitutes another in that series of actions.

Shortly after the petitioners filed their Complaint for Mandatory Injunction, on June 29, 1970, after a lapse of almost two weeks from his initial determination of the existence of reasonable cause to believe the proscribed violations had occurred, the Director filed his "Petition for Injunctive Relief Under Section 10(l)" (App. 1), followed, on July 2, 1970, by the issuance of his "Order Consolidating Cases, Complaint and Notice of Hearing" (App. 23).[2]

Upon the filing of the Director's injunction petition, these petitioners sought to clarify their status in the resulting district court proceedings. Accordingly, on June 30, 1970, Sears' counsel filed an appearance denoting Sears as a

2. As a result of the filing of the Director's petition, Sears withdrew its Complaint for Injunction. Terminal, however, moved for a partial dismissal of its Complaint insofar as it sought to compel the Director to file for that petition, but amended its Complaint to seek a declaratory judgment of the propriety both of the Director's initial refusal to proceed and of the still-existing internal agency rule which dictated or permitted his refusal. This case is currently pending in the United States Court of Appeals for the Eighth Circuit on appeal from the United States District Court for the Eastern District of Missouri (No. 71-1042).

"party" (App. 16) and, on July 1, 1970, Terminal's counsel filed a "Motion to Appeal and Participate as Full Parties Litigant" (App. 20).

Throughout this period, the Director had carried on unilateral negotiations with the union, resulting in a "Stipulation" which the Director's agents circulated to petitioners for their approval. The Director and the union intended this Stipulation to serve in lieu of the injunctive relief for which the Director had earlier petitioned. To the end of achieving such an informal agreed settlement in lieu of the injunction which Section 10(l) commanded the Director to seek, the Director failed to seek an order to show cause which would have resulted in a hearing on the petition which he had filed.

The petitioners—believing (i) that the remedial provisions of the Stipulation were inadequate; (ii) that they were entitled to participate fully, as parties, in the adjudication of their rights, including the determination of the effectiveness of any remedy and the right to present evidence to the court in the event of the Stipulation's breach, —rather than to be merely the unwilling recipients of an informal, inadequate, privately negotiated, non-self-enforcing Stipulation; and (iii) that the direction in Section 10(l) that the Director "shall" seek injunctive relief meant more than that the Director, having filed a petition under legal duress, may thereafter ignore his petition as if it has never been filed at all—filed specific and detailed objections to the proposed stipulation.[3]

On July 8, 1970, the district court disapproved the proffered Stipulation but held that the petitioners were not parties to the Section 10(l) proceedings and would not

3. On July 7, 1970, Sears formally filed five written Objections and Terminal filed a "Motion to Interdict Entry of and Objections to Proposed Stipulation", by way of documenting their opposition to the terms of the Stipulation which was negotiated and drafted without their participation.

be allowed to intervene, although they were permitted certain lesser rights, including, the right to be informed of all actions taken in the case, to be present by counsel at all hearings, to keep the court advised of pertinent developments and to receive copies of all documents filed. The court also set the matter for hearing, on its own motion, for July 15, 1970.

However, on July 9, 1970, representatives of the Director and the union proffered an amended Stipulation to the district court judge in his chambers (App. 35). The judge approved that Stipulation without the presence of the petitioners, without any advance notice to them that such a meeting was to be held, without affording them an opportunity to participate in the drafting of the document, without curing the defects previously protested and without affording them an opportunity to state any further objections to it. Petitioners learned of the meeting and the court's approval of the amended Stipulation only after those events had transpired. Moreover, the court's approval of that Stipulation had the effect of cancelling the scheduled hearing of July 15, preventing petitioners from filing Interrogatories which it had prepared for that hearing to be served upon the union; and from submitting evidence to the court, either in support of the Director's still pending petition for injunctive relief or for other relief which they deemed necessary to protect their vital and legitimate interests. Finally, the court's action violated its own order of July 8, which guaranteed to petitioners the right to notice of all proceedings in the case and the right to participate therein, and violated petitioners' right, expressed in Section 10(l), to a hearing at which it could "appear by counsel and present any relevant testimony" in connection therewith.[4]

4. The court below, while noting the contents of the district court's order, failed to state that the district court had not adhered to its order by accepting the proffered stipulation without notice to or presence of the charging parties.

The district court's decision denying to charging parties the right to participate as full parties-litigant or, alternatively, to intervene in the district court proceedings was appealed (App. 33).

On March 12, 1971, the court below affirmed the decision of the district court[5] (App. 43).

Petitioners seek herein to review that adverse decision.[6]

---

5. During the pendency of the proceedings below, these petitioners filed with this Court a Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the Eighth Circuit. The filing of said petition was predicated on the consideration that a similar substantive issue was then pending before this Court in another case, *The Los Angeles Herald Examiner, et al.* v. *Kennedy*, 91 S. Ct. 12 (1970), and a desire on the part of petitioners to expedite the Court's consideration of the question in view of the problem posed by the short-term nature of the relief afforded by Section 10(l). However, the predicate for petitioners' position was removed when, on October 12, 1970, this Court rendered a decision in the *Kennedy* case without reaching the merits of the common issue. Thereafter, on January 11, 1971, this Court denied petitioners' petition for a writ of certiorari before judgment.

6. Having failed to seek the statutorily required interim injunction relief provided in Section 10(l), the Board then sought to dispose of the underlying case by means of a "Settlement Stipulation" purporting to remedy the charged unfair labor practices. A document so entitled was submitted to the charging parties on about July 24, 1970, bearing the signatures of agents of both the union and the Director. The charging parties opposed such a disposition of their charges on the grounds that they lacked adequate information to judge whether all the substantive violations had been remedied, that they had not been afforded any opportunity to participate in the negotiation and drafting of this proposed settlement, and that the document lacked any findings of fact such as are required under Section 10(c) of the Act and without which it would be impossible to determine whether any resumption of the Union's picketing would violate the presumed proscriptions of the settlement.

In order to prevent the Director's approval of the settlement over the charging parties' objections, on July 17, 1970, the charging parties filed a complaint in the district court alleging that the Director had violated their rights under the Act and the Board's Rules and Regulations by excluding them from settlement discussions and depriving them of essential facts in connection with settlement deliberations in the underlying agency proceedings in

In sum, the history of this case reveals a series of actions taken by the Board's agents and the inferior courts whose effect has been to deprive the charging parties of rights guaranteed them in Section 10(l) and of the benefits which Congress intended that Section to afford. First, the Director declined to petition for injunctive relief despite the mandatory duty imposed upon him to do so in aid of unlawfully picketed charging parties; second, the charging parties were neither recognized as "parties" nor permitted to intervene nor meaningfully permitted to participate in the district court consideration of the Director's tardily filed injunction petition; and third, the Director refused to permit the charging parties to participate in the discussions and negotiations leading to the attempted and inadequate settlement of their meritorious charges filed with the Board.[7]

---

which they are expressly made "parties", and sought to enjoin the Director from approving any settlement or engaging further in settlement discussions without the informed participation of the charging parties.

On July 30, 1970 the district court sustained the Director's motion to dismiss the cause for lack of jurisdiction. The charging parties thereafter filed an appeal of the district court's decision.

7. The Board has agreed to stay its appellate consideration of the Settlement Stipulation effected between the Regional Director and the union in the underlying administrative proceedings until the Eighth Circuit Court of Appeals renders its decision on the charging parties' appeal from the Regional Director's refusal to permit participation by the charging parties in the negotiation and, consideration of the terms of the Settlement Stipulation (Nos. 20462, 20472) (App. 59, 66, 68).

REASONS FOR GRANTING THE WRIT.

Introductory.

The ramifications of a determination of charging parties' judicial rights under Section 10(l) of the Act are important, manifold and undecided by this Court.

In *United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 283* v. *Scofield et al.; United Automobile, Aerospace and Agricultural Implement Workers et al.* v. *Fafnir Bearing Company et al.*, 382 U. S. 205, this Court declared the *right*, after a final Board order, of successful charging parties to intervene and participate as full "parties" in the appellate consideration of their cases notwithstanding the Board's participation on their behalf. Section 10(f) of the Act confers an equivalent right upon unsuccessful charging parties.

The question posed under Section 10(l) is whether any such rights exist on behalf of charging parties when the judicial consideration of their charges occurs prior to a final Board order. It is submitted that the rationale of *Scofield* and *Fafnir* compels the extension of this Court's recognition of charging parties' vested rights in the judicial litigation of their charges to all stages of that process.

The problem has arisen in a variety of contexts in various United States Courts of Appeals. The question in *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (CA 9, 1965), concerned the extent to which charging parties could perform an independent role in the District Court in support of the Board's petition for an injunction after the Board changed its mind about pur-

suing the relief sought in its own petition. *Houston Insulation Contractors Association* v. *N. L. R. B.*, 339 F. 2d 868 (CA 5, 1964), involved a charging party's attempt to secure a stay of a Board order in the Court of Appeals the effect of which would be to continue in force an injunction granted under Section 10(l) which would otherwise have expired.

In *Solien* v. *International Printing Pressmen, et al.*, ... F. 2d ....., 76 LRRM 1094 (CA 7, 1970), the various orders of the Seventh Circuit granting the charging party the right to intervene in proceedings arising under Section [illegible] of the Act, constitute an application by that Court of the principles approved by the Supreme Court in *Arnold Tours* v. *Camp*, 91 S. Ct. 158 (1970). In *Solein*, the charging party moved to intervene in the Seventh Circuit on August 21, 1970. Over the Board's objections, the Court granted the motion. Thereafter, on persuasion of the Board, and in order to avoid further litigation of this issue, the charging party voluntarily agreed to accept the lesser status of *amicus curiae*, entered into a Stipulation with the Board so providing, and upon the Board's motion, the Court vacated its prior motion granting intervention. However, on November 27, 1970, as a result of altered circumstances in the case, the charging party again determined that it required the full protection of "party" status and so moved the Court. The Court, fully aware of the fact and nature of the Board's opposition to granting such status to charging parties in proceedings arising under Section 10(l), nonetheless, granted charging party's motion for full "party" status. Subsequently, the Board issued a final decision dispositive of the merits of the case, and upon its motion, the Court vacated as moot its prior order.

In addition to the above, the instant petition marks the fifth occasion during the last two and one-half years in

which this Court has been requested to determine the status and the rights which charging parties enjoy in proceedings authorized by or resulting from Section 10(l) of the National Labor Relations Board. In *San Francisco-Oakland Newspaper Guild et al.* v. *Kennedy,* 393 U. S. 926, this Court declined to decide whether charging parties properly may be denied an opportunity to intervene in an appeal of a favorable decision rendered by a district court under Section 10(l); in *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers,* 397 U. S. 655, this Court declined to determine whether charging parties properly may be denied a right to seek appellate review of an adverse district court decision when the Board declined to seek such review; in *Terminal Freight Cooperative Association et al.* v. *Samoff,* 90 S. Ct. 2171 (1970), this Court declined to decide whether a district court properly may deny to charging parties either the right to participate as parties-litigant there, or the right to be heard on their objections to the manner in which their substantive rights and interests are adjudicated; in *The Los Angeles Herald Examiner, et al.* v. *Kennedy, supra,* this Court was confronted with the issue of whether charging parties have standing to seek a stay of a district court's dissolution of a Section 10(l) injunction, or to intervene in the Board's effort to secure such a stay. This Court granted the petition for certiorari in a per curiam decision, in which this Court also vacated the lower court's decision as being moot, with no resolution made of the merits of the issue of charging parties' status as either full parties-litigant or intervenors.[8]

---

8. This Court has demonstrated its continuing interest in the question of charging parties' status as "parties" under the Act by recently granting certiorari in a case arising out of section 10(k) of the Act. *N. L. R. B.* v. *Plasterers Local Union No. 79, Operative Plasterers and Cement Mason's International Association, AFL-CIO, et al.* (No. 1183, October Term, 1970).

A decision in the instant case will decide the underlying questions presented, but not resolved in both *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers, supra,* and *The Los Angeles Herald Examiner* v. *Kennedy, supra.* For, by deciding the issue of whether charging parties have the status of full party-litigants or, alternatively, intervenors in district court injunctive proceedings, subsequent to the initiation of said proceedings by the Regional Director, then the related issues of their right to seek appellate review of adverse district court proceedings (Sears) and to seek a stay of a district court dissolution of Section 10(l) injunctions (Los Angeles Herald Examiner), rights which necessarily attach to "party" status, will be conclusively determined. Moreover, the predicate for this Court's prior refusal to decide these issues—mootness—has been withdrawn in the instant case, both by the Circuit Court's decision and the Board's agreement to stay its appellate consideration of the underlying case.

Finally, the instant case presents the question as to whether charging parties may participate as "parties" in the district court disposition of cases resulting from their filing of charges with the Board, based upon injuries they suffered as a consequence of the violation of their statutory rights for which the statute, in Section 10(l), provides relief to them from a continuation or repetition of the legal wrongs which they suffered.

The foregoing summary plainly reveals that the problem of defining the rights and the status of charging parties in proceedings under Section 10(l) is both a serious and recurring one. The absence of guidance from this Court can only serve to promote expensive and time-consuming litigation as charging parties in such cases, unclear as to their rights and the level of participation to which the protection of those rights may entitle them, will continue to seek judicial clarification.

Further, apart from the merits generally of a resolution by this Court of a problem which would otherwise inevitably give rise to recurring disputes, certiorari is also sought because the decision of the Circuit Court below is inconsistent both with the demonstrable intent of Congress, decisions of other circuit courts,[9] and related decisions of this Court.

A. The Right of Charging Parties to Function as "Parties" in Proceedings Arising Under Section 10(l) Is a Product of Congressional Intent as Evidenced by the Legislative History, the Statutory Scheme, and Decided Authority of This Court.

In deciding the issue of the extent to which charging parties are afforded full party status in actions for temporary injunctive relief under Section 10(l) of the Act, after their initiation by the Regional Director, the court below acknowledged the existence of "cogent reasons" why charging parties *should be* accorded such status. Nevertheless, in upholding the district court's decision, the court predicated its decision principally on a lack of legislative support for petitioners' position. The court did not deny the fact (i) that congressional silence, as has been found by this Court, is not necessarily controlling in determining the existence of asserted rights[10] or (ii) that the existence of the rights to full party status can reasonably be derived from an analysis of the scheme of the statute. Rather, the only support for its conclusion that the legislative history

9. *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc., supra; Houston Insulation Contractors Association* v. *N. L. R. B., supra; McLeod* v. *General Electric Co.*, 366 F. 2d 847 (C. A. 2, 1969).

10. *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, 11; *U. A. W.* v. *Scofield (Fafnir Bearing Co.), supra; Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970); *Barlow* v. *Collins*, 397 U. S. 159 (1970).

did not support the existence of such status was legislative silence. Upon reaching this conclusion, the court then supported it by reference to a Tenth Circuit Court of Appeals decision (*Sears, Roebuck & Company* v. *Carpet Layers Local,* 410 F. 2d 1148 (1969)), wherein the issue decided—the right of a charging party to seek appellate review of an adverse district court decision when the Regional Director declines to seek such review—was much narrower than that herein. Moreover, this Court granted certiorari in that case and vacated the decision of the Court of Appeals. Therefore, that decision can not be utilized as a rationale, as it was by the court below, for concluding that charging parties lack "party status" under Section 10(l). While it is true that Section 10(l) itself is silent with respect to the "status" of charging parties thereunder, it is submitted that an analysis of the legislative history, statutory scheme and relevant case law compels a conclusion that charging parties possess the status of "full parties" in all proceedings arising under Section 10(l) of the Act after such proceedings are initiated by the Regional Director.

1. Analysis Of The Legislative History Establishes Congressional Intent That Charging Parties Be Granted "Party" Status in Proceedings Under Section 10(l).

The debates in both the 79th and 80th Congress preceding the adoption of the Taft-Hartley amendments to the labor laws dealt extensively with the conflict between (i) the right of private parties to a speedy and effective remedy against the devastating effects of secondary boycotts and jurisdictional disputes, (ii) the need to retain the prohibitions against permitting courts to grant injunctions in labor disputes, as contained in the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U. S. C. Sections 101-15, and (iii) the need to preserve the scheme of the old Wagner Act in which procedures of the National Labor Relations Board were available for primary settlement of labor disputes.

The 79th Congress evidenced a strong intention that private parties be granted the most direct protections from the crippling effects of unlawful secondary activity when both houses passed the Case Bill,[11] which permitted both the Government *as well as private parties,* directly and independently, to seek temporary injunctive relief in secondary boycott cases. However, President Truman vetoed the Case Bill, which veto survived the effort of a majority of the House to override it.[12]

The veto of the Case Bill was motivated by a concern that the emergency strike provisions proposed therein were inadequate and also the fear that to permit private parties independent and direct access to injunctive relief would essentially represent a repeal of the Norris-LaGuardia prohibition on injunctions in labor disputes.[13]

The conflict facing Congress was clear. On the one hand, it was recognized that the speediest and most efficient manner for remedying an unlawful strike would be to permit neutral employers victimized by secondary boycotts to seek an injunction without the delay incident to awaiting the results of a hearing on the merits of the dispute before the Labor Board. On the other hand, however, it was necessary to avoid another Presidential veto and still provide means by which neutral employers could obtain temporary injunctive relief. The 79th Congress ended without resolving this practical dilemma.

When the 80th Congress was convened, Senate Bill 55 was introduced and contained similar provisions to the

11. 92nd Congressional Record 5946 where the House approved the Senate revisions contained at 92 Cong. Rec. 5929, which provided for temporary injunctive relief sought directly by private parties in secondary boycott situations.

12. 92nd Cong. Rec. 6674 and 6678. Of 431 Congressmen, 255 voted to override the veto, 135 voted to sustain it and 41 did not vote.

13. Messages to Congress; re Case Bill Veto p. 1686, 1962.

Case Bill with respect to the right of private parties to seek injunctive relief. In the 80th Congress, the House had also passed a bill which permitted private parties directly and independently to seek temporary injunctive relief. Hearings were held on S. 55 and related bills. It was apparent at that time that compromise was necessary in order to avoid another veto.[14]

The statute, as ultimately adopted, predictably represented a compromise. In order to provide a meaningful remedy for employers faced with unlawful picketing, injunctive relief was provided. However, in order to avoid a situation in which employers could forum-shop or achieve an independent development of the law through *their* selection of theories of violation and relief, *i.e.*, the abuses which gave rise to Norris-LaGuardia, the right to *initiate* injunction suits was limited to the Board. Thus, Congress sought to afford employers an injunctive remedy while preserving the National Labor Relations Board's principal role in the labor field by confining to the Board's judgment both the identification of the cases in which injunctive petitions should be filed, and, necessarily, the nature of the violations to be alleged and the limits of the relief to be sought therein.

The significance of this legislative background to the issue of the extent of charging parties' rights in injunction proceedings is threefold:

(1) There existed substantial Congressional support for the proposition that charging parties before the Board who were victimized by illegal picketing should have a *right* of access to the courts in order to obtain relief and protection from such conduct.

(2) Concern over a possible emasculation of Norris-LaGuardia resulted in a compromise in which charging

14. 93 Cong. Rec. 4844 (remarks of Sen. Taft).

parties were prohibited only from *instituting* suits for injunction; no limitation on their *right* otherwise to participate in court proceedings in furtherance of such petitions, when filed by the Board, was either expressed or implied.

(3) Since Section 10(l) as ultimately enacted, represented a compromise between the interests of affording to private parties the speediest and most direct remedy against the devastating effects of illegal boycotts and strikes, and of avoiding another presidential veto and a recurrence of the abuses giving rise to the passage of Norris-LaGuardia, all rights incident to speedy and direct protection from the proscribed conduct by charging parties themselves, except the right to initiate injunctive proceedings, should be imparted into the interpretation of the Section.

It follows, therefore, that Section 10(l) should not be afforded the narrow interpretation given it by the Circuit Court below. As indicated by the legislative history, the *sole* limitation placed by Congress upon private parties' rights to participate in the district court injunction proceedings stemming from their filing of charges with the Board is their right to initiate such proceedings. Once the Board has filed a petition for such injunctive relief, a reading of the statute requires a recognition of charging parties as judicial "parties" thereafter. Such an interpretation,—apart from giving effect to the equitable truism that one whose initiative and interest gives rise to a court proceeding and whose personal and property interests are vitally effected by its outcome should have a right to fully participate in district court determinations intimately and directly affecting those interests—similarly gives effect both to the views of those legislators who sought to limit encroachment on Norris-LaGuardia by preventing private parties from freely instituting injunction proceedings on their whim, and those others who sought to guarantee pri-

vate parties the right to full access to the courts as the best means for protecting their vital interests.

Consequently, when the Board does institute an injunction action, and charging parties thereafter seek the success of the Board's petition,—whether in the district court or in appellate courts,—charging parties thereby exercise rights which the legislative history of the Act demonstrates that Congress intended them to possess and whose possession and exercise is incompatible with lesser than "party" status.

2. The Scheme of the National Labor Relations Act Evidences Congress' Intent That Charging Parties Constitute "Parties" in Proceedings Under Section 10(l).

In general, Section 10(l) constitutes a mandatory direction on the Board's agents to file a petition for injunctive relief in aid of aggrieved charging parties whenever it appears that there is reasonable cause to believe that the latter's charges are true that they have been victimized by certain illegal strikes, picketing or boycotts prohibited by Sections 8(b)(4) and 8(b)(7) of the National Labor Relations Act. Section 10(l) goes on to provide, in relevant part:

> "Upon filing of any such petition the courts shall cause notice thereof to be served upon any person, involved in the charge and such person, *including* the *charging party*, shall be given an opportunity to appear by counsel and present relevant testimony . . ." (Emphasis added.)

While Section 10(l) states nothing further regarding any participants' additional rights in the district court proceedings, and nothing whatever regarding any appellate rights, it is by now well established that the fact of Congressional silence does not, by itself, govern the question of their existence or non-existence. The United States

Supreme Court has frequently found rights to exist in the face of Congressional silence when an analysis of the statutory scheme reveals an uncodified Congressional purpose.[15]

A cogent example of the proper approach to a definition of rights in the face of legislative silence is demonstrated by the fact that nowhere, either in Section 10(l) or anywhere else in the Act, does Congress specifically authorize appellate review by respondents against whom an injunction has been issued by a district court. While it is true that the exercise of this right is customary in our judicial system, it is also true that in Section 10(f) of the Act, Congress only expressly codified its exercise as to respondents against whom final agency orders had been issued. Pursuant to the theory of the court below, therefore, Congress' failure to provide an analogue to Section 10(f) in cases involving injunction proceedings should indicate its desire that enjoined respondents lack the right of review. Similarly, pursuant to the theory of the court below that what is unstated was not intended, charging parties in cases under 10(l) lack the *right* to cross-examine witnesses, to file briefs, to respond to motions, and only possess the right, specifically given by Congress "to appear by counsel and present any relevant testimony". The anomalies created by such a restrictive interpretation are obvious. Accordingly, the view of the court below that the words of Section 10(l) must be literally construed cannot be sustained through either practice of the Board or logic.

As did an analysis of the legislative history, an analysis of Section 10(l), in conjunction with the statute of which it is a part, establishes that Congress intended charging parties to enjoy the status of "parties" under Section 10(l), possessing the rights and privileges of that status.

In fashioning the statute, Congress everywhere made the participation and interests of the charging party central to all proceedings authorized in the Act.

---

15. See cases cited, footnote 10, *supra*.

a. Participation by the Charging Party.

(1) In Section 10(b), Congress made the charge by an injured party the jurisdictional prerequisite to the filing of the initial Board complaint;

(2) Under the Board's construction of the Act, it has accorded the charging party with the status of a full party litigant in all proceedings before the Board, without limitation as to the various stages of the proceedings involved;[16]

(3) The charging party is accorded the right to appeal adverse decisions of Trial Examiners to the Board, in Section 102.46(a) of the Board's Rules;

(4) The charging party is accorded the further right to seek, after issuance of the Board's order, a reopening of the hearing, rehearing, or reconsideration; Section 102.48(d) of the Board's Rules;

(5) The charging party is deemed a "person aggrieved" within the Congressional intent of Section 10(f), and thus entitled to invoke judicial review of final orders of the Board if the Board refuses any of the relief sought by the charging party. (*Albrecht* v. *N. L. R. B.*, 181 F. 2d 652 (CA 7, 1950), and cases there cited);

(6) Just as a charging party independently may seek appellate review in all cases where he was unsuccessful before the Board, similarly, he may participate as a full party in the appellate review of cases where he was successful. (*U. A. W.* v. *Scofield, supra*, which so held despite the statute's silence in conferring that right and over the Board's objections there that legislative silence indicated that Congress did not intend to grant successful charging parties the right to participate in such appellate proceedings.)

16. Section 102.8 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, defines those who shall be deemed a "party" before it and includes in that group ". . . any person filing a charge or petition under the Act, . . .".

Thus, as acknowledged by the Circuit Court in its decision, by filing a charge the charging party becomes a full party before the General Counsel in the investigative stage, before a Trial Examiner after Complaint has issued and with full appellate rights, before the Board on review of the Trial Examiner's decision, in the appellate courts after the Board's decision, and with the right independently to seek certiorari from the Supreme Court.

It is against this background that the Circuit Court below held that Congress' failure *specifically* to label charging parties as "parties" in district court proceedings brought by the Board establishes Congress' intent that they should not possess that status there, although they do possess it for all other purposes, whether expressly provided by Congress or not, in all other proceedings authorized in the Act.[17]

b. Recognition of the Interests of the Charging Party.

Not only does the Act accord to charging parties the status of full "parties" in all proceedings before the Board, and clothe them with all the procedural safeguards customary to that status including the right to seek review at all levels of those proceedings, but the Act also recognizes that the rights which are thus protected include the charging parties' private or parochial rights and interests. One of the principal holdings in *U. A. W.* v. *Scofield, supra*, was precisely the proposition that the Act recognizes and enforces the private rights of aggrieved parties, and not merely generalized "public rights". Thus, the right to be free of the effects of an unlawful secondary boycott, while it is a right which the Board enforces in the public interest,

17. Moreover, the language of Section 10(l), wherein Congress makes reference to respondent unions as "parties" can not be interpreted as demonstrating Congressional intent to relegate other persons to a lesser status, but is only for the purpose of making clear that unions constitute entities capable of being sued.

is also a private enforceable right of the aggrieved victim of that boycott.

One of the means by which the Act affords relief from the effects of unlawful boycott activity is the provision for injunction found in Section 10(l). Hence, to say that the Act enforces private rights means that there is a private right to the relief provided in Section 10(l). However, there would be no point to recognizing the distinction between a private and a public right if the private beneficiary were not accorded a role separate and independent from the Board in supporting and protecting it.

The nature of that role is only consistent with "party" status. This result follows from the fact that such a status is conferred upon charging parties for every other purpose and in every other respect under the Act. It follows from the inescapable conclusion that the private rights protected under Section 10(l) are as significant as any others recognized by the Act and for whose protection and enforcement party status is conferred.[18] And it follows by implication from the terms of Section 10(l) itself.

Manifestly, the enumerated rights of participation granted charging parties in Section 10(l) exceed those associated with the status of an *amicus curiae*. An *amicus* is not entitled to participate actively in the development or introduction of evidence, or to raise objections, or to make argument during the course of the litigation; he is limited instead, and only with the Court's permission, to oral argument or the filing of briefs *after* the record is made. However, the express and necessarily implied pro-

18. The fact that Congress imposed a *mandatory* duty on the Board to enjoin the unlawful strikes and boycotts which constitute the subject matter of Section 10(l) proceedings, whereas the Board was merely given the *discretionary* power, in Section 10(j) to seek injunctive relief against all other types of unfair labor practices, reveals Congress' view of the relative significance of the private rights protected by Section 10(l).

visions of Section 10(l) permit charging parties, without need of the court's permission, to be represented by counsel throughout the proceedings, to call and cross-examine witnesses, to offer contentious evidence, to introduce documentary and other relevant matter, to make and respond to oral argument and to file briefs. In exercising these rights the charging parties not only create the record which will govern their destinies in the district court, but they also narrow the issues and shape that record for appellate review. Were the statute intended to relegate charging parties to the status of *amici*, then their role would not have been expanded to permit such full and active participation as a matter of right.

Congress' intent to afford charging parties under the Act a full participatory role in district court injunctive proceedings as well as before the agency itself—a role exercised only by "parties"—is further evidenced by analogy to what Congress provided in the provisions of the Judicial Review Act, 5 U. S. C. Sections 103-42.

The latter statute, which purported to import the procedures of the National Labor Relations Act into the schemes of other Federal agencies, contains the following relevant provisions in Section 1038:

> "The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside or suspended, may appear as *parties* thereto on their own motion and as of right, and be represented by counsel in any proceedings to review such order . . ."
>
> "The Attorney General shall not dispose of or discontinue said proceeding to review over the objection of such *party or intervenors* aforesaid, but said intervenor or intervenors may prosecute, defend or continue said proceeding unaffected by the action or nonaction of the Attorney General therein." (Emphasis added.)

In short, if Congress had not intended charging parties to function as "parties" in proceedings under Section 10(l), then it would not have granted them rights under that Section such as only "parties" can exercise and which precise rights they may exercise as "parties" in pursuance of their private interest for all other purposes under the Act.

c. Congressional Intent as Revealed in a Comparison Between the Language of Sections 10(j) and 10(l) of the Act.

Sections 10(j) and 10(l) are alike in that both authorize the Board, acting through its Regional Directors, to institute petitions for injunction when the Regional Director believes that charged unions have engaged in such injurious unfair labor practices as render extraordinary injunctive relief appropriate. The sections differ only in that pursuant to Section 10(j), injunctive relief *may* be sought for any violation of that statute, whereas Section 10(l) provides that such relief *must* be sought for the violation of the specific and particularly injurious unfair labor practices enumerated therein.

Whereas Section 10(l) requires that charging parties be notified of the filing of the petition and be permitted to appear by counsel and present any relevant testimony, Section 10(j) requires only that they be notified of the filing of the petition. The difference in the nature and extent of the rights granted the respective charging parties in these sections manifests Congress' intent to confer on charging parties in 10(l) cases such rights of participation as would guarantee the fullest protection of their interests. Such a guarantee goes beyond the presence of and the representation by the Board, which was deemed adequate to protect charging parties in cases arising under 10(j) but was deemed inadequate for cases under 10(l). Rather,

the nature of the additional guarantee afforded by Congress was affirmatively to confer upon charging parties in 10(l) cases the status of "parties".[19]

Indeed, if Congress believed that the judgment and participation of the Board in injunction proceedings under Section 10(l) would suffice fully to protect the charging parties' interests, and that they should have no independent role in the participation and prosecution of the case which was not circumscribed by the Board, then there was no need for Congress explicitly to confer rights upon charging parties in 10(l) cases which were denied to those in 10(j) cases. The adoption of such a view would render meaningless the deliberate statutory distinction between the rights conferred in the two sections. It follows, therefore, that Congress intended to accord charging parties in 10(l) cases the independent status of "parties", clothed with the rights of that status, including, for example, the right to participate in the settlement of cases arising under Section 10(l), to fully participate in district court proceedings, and to seek appellate review of adverse decisions in the district court.

---

19. The difference between the rights accorded to charging parties in the two sections is justifiable on two grounds. First, the nature of the conduct with which Section 10(l) deals, *i.e.*, unlawful strikes and boycotts, inherently involves the greatest potential harm to the aggrieved victims. For this reason Congress also imposed a mandatory duty on the Board to seek injunctive relief in cases arising under that Section whereas in all other cases, such as are dealt with in Section 10(j) the Board is given discretion as to whether to seek such relief.

Second, it would be inconsistent with the discretion accorded the Board in Section 10(j) to confer independent party status on charging parties in the latter cases, since they might seek to go forward in instances where the Board's discretion dictated otherwise. Clearly, when the Board is required to proceed, as in Section 10(l), no such potential conflict exists.

B. Whether or Not Charging Parties Are Conferred "Party" Status Under Section 10(l), They Have a Right to Intervene in All Proceedings Related Thereto.

1. The Right of Charging Parties to Function as "Parties" Under Section 10(l) Through Intervention Is Established by Analogy to Their Standing to Secure Appellate Review.

Respected scholars and courts have expressed the view that interests which are adequate to confer standing to seek judicial review are also adequate to confer the right to participate as parties in the proceeding from which review may be sought. Professor Davis has concluded that:

> ". . . the problem of right to intervene in administrative proceedings is closely related to and in some measure governed by the elaborate body of law concerning standing to challenge and to enforce administrative action."[20]

This view has found judicial approval, for example, in the Court of Appeals for the District of Columbia Circuit:

> "Cases concerning the question of standing [to seek review] have been used interchangeably in resolving questions of standing to intervene. Except for the adjustments necessary for assuring the manageability of administrative proceedings, the criteria for standing for review of agency action appear to assimilate the criteria for standing to intervene." (footnote citations omitted.)[21]

The criteria for determining when standing to seek review exists have recently received extended attention from this Court in *Association of Data Processing Service Or-*

---

20. I Davis, Administrative Law Treatise, Section 8.11 at 564 (1958).

21. *The National Welfare Rights Organization, et al.* v. *Finch, et al.* (Nos. 23,787, 23,890, CA DC, decided June 9, 1970), slip opinion, pp. 13-14.

ganizations Inc. v. *Camp, supra,* and *Barlow* v. *Collins, supra.* The tests for determining the existence of such standing were stated by the Court as follows:

> (1) "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise" and
> (2) "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (*Data Processing Service, supra,* 397 U. S. 150 at 152, 153.)[22]

As judicially interpreted and clarified, an injury of any kind in fact to any person or group which is the beneficiary of the statute under which the plaintiff raises his claim is sufficient to confer the right of full participation as a "party" as well as standing to seek review, unless the statute *expressly* or by necessary implication provides otherwise. The fact that Congress may not have expressly conferred standing on the group of which the complainant is a member is not necessarily controlling.[23] This principle received support from Professor Louis L. Jaffe, who, in discussing the issue of standing in the absence of express congressional direction has stated the doctrine thus:

---

22. The principles of these cases were most recently restated by the Court in *Arnold Tours* v. *Camp, supra,* where the Court reiterated its approval of the "growing trend toward enlargement" of the class of persons having independent standing to seek review.

23. Standing results from the satisfaction of the two stated criteria, in reliance upon the evidence of Congress' intent which is afforded by the Administrative Procedure Act, 80 Stat. 392, 5 U. S. C. Section 701, *et seq.,* in which Congress provided, in Section 702:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

See also *Barlow* v. *Collins, supra,* 397 U. S. at 164-5; *The National Welfare Rights Organization, supra*; *U. A. W.* v. *Scofield, supra*; *Arnold Tours* v. *Camp, supra.*

> "Where a statute does not provide for review or does not specify the class of plaintiffs who may seek review, the Supreme Court has followed the lead of Mr. Justice Brandeis in the *Chicago Junction Case* (264 U. S. 258, (1924)) and in *Alexander Sprunt & Son, Inc.* v. *United States* (28 U. S. 249 (1930)). The doctrine thus developed is that a plaintiff whose interest it is one of the purposes of a statute to protect *in whatever degree* is entitled to seek review. . . "[24] (Emphasis added.)

Moreover, Professor Jaffe does not appear to subscribe to the restrictive view expressed by the Circuit Court below that the *Data Processing* case applies only to review of adverse agency action. In discussing the applicability of *Data Processing,* he concludes that standing under the *Data Processing* rationale reaches *anyone* "arguably within the zone of interest to be protected." That Congress intended that the benefits of 10(l) injunctive relief inure directly to charging parties, thus placing them within this "zone of interest", has been amply demonstrated through an examination of the legislative history, *supra.*

It is submitted, therefore, that the Circuit Court's interpretation of *Data Processing* and *Barlow;* limiting their applicability only to situations in which adverse agency action is involved is too restrictive. While the conclusions stated in the excerpts quoted above address themselves principally to status in and review of administrative proceedings, they should not be limited to such proceedings since the logic which supports those conclusions have universal applicability. The interests which are adjudicated in administrative proceedings are as important as those with which courts regularly deal; the consequences of adverse decisions are as harmful; and there is no greater guarantee that administrative agencies will decide wisely and correctly than that inferior courts will do so. Given

24. Jaffe, *Standing Again,* 84 Harv. L. Rev. 633 (1970).

these parities, it follows that the need to afford charging parties the fullest protection of their interests in cases arising under Section 10(l) in district court proceedings, after those cases are initiated by the Regional Director, is as great as the need to protect their equivalent interests before the administrative agency.

Therefore, it follows that whenever a litigant's interest in the result of a suit is sufficient to permit him to obtain appellate review of an adverse result, then than interest should also entitle him to the fullest participatory role in the conduct of the suit, whether it is an administrative or a judicial proceeding.

> "The right of judicial review cannot be taken as fully realized, however, if appellants are excluded from participating in the proceeding to be reviewed."[25]

In addition, if the petitioners herein have standing to review the merits of an adverse decision rendered in a district court proceeding under Section 10(l), then they are entitled to function in that district court proceeding and all resulting proceedings as "parties," through intervention if necessary, in order to protect their vital interests and to avoid any subsequently reviewable injury.

The application to the facts of this case of the tests defining standing to seek review reveals that the petitioners should have been permitted to intervene and participate as full party-litigants even if, in the court's view, they did not affirmatively possess the status of "parties" under Section 10(l) in the proceedings there: Section 10(l) affords relief to them from violations of their right to be free of unlawful secondary boycott activity; an adverse decision by the district court in refusing to grant relief, or in granting lesser relief than that initially sought by the Director and subsequently urged by petitioners would clearly constitute an

25. *The National Welfare Rights Organization, et al., supra,* slip opinion, p. 21.

injury to interests for whose very protection Section 10(l) was enacted.

In fact, by approving the Director's and union's profferred Stipulation in lieu of granting injunctive relief pursuant to the then pending petition, the district court did inflict such injury. The Stipulation, which was approved over the charging parties' objections, was not an adequate substitute for the statutorily-guaranteed right to injunctive relief. Whereas the granting of an injunction after a hearing requested by the charging parties would have the significant deterrent effect of subjecting a violating party to proceedings in contempt, the Stipulation had not such deterrent effect. That Stipulation constituted only an agreement not to engage in secondary boycotts which, if violated, permitted the Board, when and if it was able and disposed, to secure from the district court an ex parte restraining order. Such an order, pursuant to the express terms of Section 10(l), would expire after five days. For any further relief, a full hearing is required with notice and full participatory rights guaranteed to all parties.

Thus, the resumption of unlawful boycott activity by the union would not have subjected it—nor would such a resumption subject it now—to contempt but would only have entitled it to a full hearing whose conclusion could only have yielded precisely that injunction to which the charging parties had claimed themselves to be entitled from the outset.[26]

---

26. Nor has the Stipulation, which was designed to serve in lieu of interim injunctive relief pending the Board's adjudication of the underlying dispute, succeeded in resolving any disputed contentions. The district court rejected the initial Stipulation proposed in the Section 10(l) proceeding because the Union insisted on its right to picket these petitioners; the Board's Complaint alleged all such picketing to be unlawful. The Stipulation as finally approved did not incorporate the Board's view; rather, it was silent on the question as to whether, and under what conditions, the

Apart from the delays and the absence of genuine deterrent effect inherent in this procedure, the Circuit Court's decision failed to recognize the charging parties' "party" standing under Section 10(l) and yielded further damage to their legitimate interests. Pursuant to the Stipulation actually approved by the district court only the Board was empowered to petition the court for relief should the union resume its unlawful conduct. However, had the district court acknowledged the charging parties' status as "parties", then those charging parties could have acted unilaterally to bring to the court's attention any subsequent resumption of the unlawful conduct which caused the Board to file for injunctive relief in the first instance and without the necessity for charging parties to revert anew to the procedures of the administrative agency and the resultant delays inherent in the administrative process which traditionally inhibit the Board's ability to move with equivalent dispatch. Moreover, the Stipulation approved by the court failed to set forth sufficient findings of fact giving rise to the prohibition contained therein, creating a needlessly difficult problem in determining whether a resumption of picketing would in fact violate any such prohibitions.

Thus, whereas Section 10(l) requires the mandatory seeking of injunctive relief, the Director failed to take any action, after the act of filing the petition, to obtain such relief, over the objection of petitioners who were unable to make an adequate record on their own behalf, who were neither present when the district court approved the Stipulation nor even on notice that the court was then considering such approval, and who had not even been afforded

---

Union might engage in such picketing in the future. Therefore, instead of defining both parties' rights and limitations, the approved Stipulation finesses that all-important problem and invites future disputes.

the opportunity to examine the document prior to its approval by the court, all in violation of the rights granted them in Section 10(l) and as a consequence of being denied the right to participate as parties or to intervene.

Accordingly, under the tests of *Data Processing Service* and *Barlow, supra,* that standing to seek review follows from (i) an injury to a plaintiff, (ii) sustained pursuant to an alleged misapplication of a statute under which plaintiff raises his claim, petitioners herein have standing to review the decisions of the district court and circuit court.[27] And pursuant to authorities holding that the possession of that standing confers on such plaintiffs the right to participate as party-litigants in the proceedings ultimately to be reviewed,[28] petitioners should have been accorded that right in the district court below.

2. Charging Parties' Right to Intervene in Proceedings Under Section 10(l) Also Derives from This Court's Decision in UAW v. Scofield (Fafnir Bearing Co.).

The Circuit Court's decision sustaining the district court's refusal to permit petitioners, charging parties before the Board, to intervene in proceedings under Section 10(l) is in conflict with this Court's decision in *Scofield.*

27. While the question of the right of charging parties to review the merits of district court decisions rendered under Section 10(l) has not been definitely adjudicated, the existence of such a right appears to follow necessarily from this Court's decisions in *Data Processing Service* and *Barlow.* The only contrary appellate court result was expressly vacated by this Court in *Sears, Roebuck and Co.* v. *Carpet Layers Union, supra.* See also *United Steelworkers* v. *N. L. R. B.*, 376 U. S. 492; *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335.

28. *American Communications Association* v. *U. S.*, 298 F. 2d 648, 50-1 (CA 2, 1962); *National Welfare Rights Organization et al. supra*; Davis, Administrative Law Treatise, *supra*; In re: *Keystone Realty Holding Co.*, 117 F. 2d 1003, 1005 (CA 3, 1941); *Gleeson* v. *Carr*, 219 F. 2d 64, 67 (CA 9, 1955), cert. den. 350 U. S. 827; *Ashbacker* v. *F. C. C.*, 326 U. S. 327.

In *Scofield,* this Court argued generally for the fullest participation by charging parties in the judicial consideration of cases initiated by their charges with the Board. Although the precise question involved there related to the right of successful parties before the Board to intervene in review proceedings of final Board orders in the appellate courts, the rationale of the decision applies as well to intervention rights in the district court. The same "private interests" are at stake in both; the same possibility of injury to those vital interests exists in both. While in both tribunals, the charging parties' interests are represented by the Board's agents, nonetheless, just as the Board's presence and representation does not exclude the exercise by charging parties of an independent role in appellate deliberations, so also the same representation should have no greater effect in the district court when comparable rights and potential injuries are involved. Moreover, the advantages which, according to *Scofield,* accrue to the process of judicial deliberation through permitting intervention in enforcement proceedings in the appellate courts, apply as well to Section 10(l); these consist of evolving the fullest record for review, simplifying and clarifying the issues, and, in general, placing the matter before the court in the best posture for securing a thoughtful and encompassing decision.[29]

Contrary to the Circuit Court, petitioners herein submit that analysis of this Court's *Scofield* decision leads to the

29. The applicability of *Scofield* to district court proceedings finds support from Professor Jaffe:

> "If the statute allows a party to appeal from an adverse Board decision why not from an adverse judicial ruling? I am not a friend to loose intervention practices, to practices which threaten to encumber administrative hearings and judicial review. But the interest of a charging party—as the statute itself makes clear—is central to the whole proceeding. To allow intervention merely accords to that interest a customary protection." Jaffe, *Judicial Control of Administrative Action,* p. 545 (1965).

conclusion that *Scofield* applies, as well, to proceedings under Section 10(l). This conclusion derives from the fact that in the course of explication of the rights which charging parties may exercise in view of the level of their vital interests, this Court approvingly cited *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc., supra* (discussed in greater detail, *infra*). The *Retail Clerk's* case arose under Section 10(l) and permitted charging parties an expanded exercise of rights for the same basic reasons as did the Supreme Court in *Scofield*,—i.e., a recognition of the existence of private rights requiring an independent private role in their protection.

In brief, this Court's decision in *Scofield*, that the Board does not have *exclusive* authority to represent and protect the particular and private interests of the charging parties, applies as a matter of logic to all proceedings in all tribunals where those interests are involved and require informed and interested protection.

Finally, apart from the fact that the Circuit Court's restrictive interpretation of *Scofield* violates the logic of that decision, its' conclusion with respect to the applicability of Rule 24(a)(2) of the Federal Rules of Civil Procedure, is also inconsistent with this Court's *Scofield* decision, wherein this Court considered this rule to be relevant by analogy.

This Rule provides:

> "*Intervention of Right.* Upon timely application, anyone shall be permitted to intervene in an action . . . When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The Circuit Court held that the existence of the Board's expertise and experience insured that the interests of the

Charging Parties would be "adequately represented". However, this Court has demonstrated that this is not necessarily true for, in rejecting the Board's claim in *Scofield* that it should function as the charging parties' sole representative, this Court established the proposition that the charging parties' private interests which the Act recognizes and protects are not always "adequately represented" by the Board. It follows, therefore, that Rule 24(a)(2), which this Court has applied by analogy to appellate proceedings, should similarly be applied in connection with charging parties' efforts to intervene in proceedings under Section 10(l).

3. The Authorities.

The decision of the Circuit Court in the instant case adds to the existing disharmony of other circuit courts which have dealt with the question of the status of charging parties under Section 10(l).

Whereas the Ninth Circuit, in *Kennedy* v. *Newspaper Guild, supra,* held that charging parties lacked standing to seek a stay of a district court's dissolution of a Section 10(l) injunction, or to intervene in the Board's efforts to secure such a stay, the Fifth Circuit held to the contrary in *Houston Insulation, supra.* The decision in *Kennedy* was subsequently vacated by the Supreme Court.

In *Henderson* v. *International Union of Operating Engineers, Local 701,* 420 F. 2d 802 (CA 2, 1969), the Ninth Circuit concluded that the successful charging party in a 10(l) proceeding lacked standing to constitute an "appellee" in the court of appeals and was relegated to the status of *amicus curiae.* However, the court's analysis of Section 10(l) appears to be inconsistent with its conclusion. At footnote 2 of its decision, the court stated:

> "Under [Section 10(l)], *any* person involved in the charge is entitled to appear in the district court by

> counsel and to present relevant testimony. If the order entered by the district court aggrieves any such party, it undoubtedly has the right to appeal." (Emphasis added.)

Thus the court appears to hold that while a successful charging party may not intervene in an appeal of that successful result, if he loses in the district court then he may appeal the unsuccessful result himself, a right consistent only with party status. Such a decision is, apart from its logical infirmity, totally inconsistent with this Court's holding in *Scofield, supra.*

And in *San Francisco-Oakland Newspaper Guild* v. *Kennedy, supra,* cert. den. 393 U. S. 926, the Ninth Circuit similarly held that a successful charging party could not intervene in the appellate review of a Section 10(l) proceeding. That decision, too, appears to be in conflict with *Scofield,* with the Second Circuit's decision in *McLeod* v. *General Electric Co., supra,* and with various district courts which have found the right to intervene to be part of the scheme of 10(l). See *David* v. *Hotel and Restaurant and Bartenders International Union, et al.* (D. C. Okla., No. 66-68, 1966), (unreported but described in the Thirty-first Annual Report of the N. L. R. B., at 155-6); and *Penello* v. *Plumbers Local Union No. 5,* 41 LRRM 2269 (D. C. Va. 1957):

> "Section 10(1) of the Act plainly authorizes participation by the charging party. Intervention is necessary to implement this right." (Citations omitted.)

The principal judicial authority in the interpretation of Section 10(l) is an earlier Ninth Circuit decision, *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc., supra.* The preeminence of this decision derives not only from the fact that its analysis is so much more thoughtful and detailed than that of any other decision on the subject,

but also from the fact that its merits were specifically approved by the Supreme Court in *Scofield*.[30]

The question before the Court in *Retail Clerks*, as it is here, concerned the extent and the nature of the rights possessed by charging parties pursuant to Section 10(l) in the district court proceedings to which their charges gave rise.

In *Retail Clerks*, pursuant to an appropriate charge filed with him and his investigation thereof, a Regional Director filed a petition in a district court for a temporary injunction under Section 10(l) to prevent a union from enforcing an alleged "hot cargo" agreement. Thereafter, instead of pursuing his pending petition for injunctive relief, the Regional Director executed a Stipulation with the offending union according to which the latter would cease its alleged unlawful conduct. The Regional Director filed this Stipulation in the district court and sought its approval by that court in lieu of injunctive relief. The charging parties, however, opposed the approval of the Stipulation and urged the court to grant injunctive relief pursuant to the Regional Director's pending petition and over the Regional Director's objections. The district court, cognizant that the charging parties' vital interests were involved and that the statute was enacted in order to provide protection to just such interests of such parties, recognized their right to an effective hearing on their objections to the Stipulation. After hearing the evidence, the court granted the injunction as the charging parties requested and over the objection of the Regional Director. The union and the Regional Director then appealed from the order granting the injunction.

---

30. While its subsequent decisions have not uniformly applied the logic of *Retail Clerks*, neither has the Ninth Circuit ever rejected or modified or reflected any doubt as to the merits of the teaching of that case.

In his appeal, the Regional Director contended, *inter alia*, that the private charging parties lacked standing either to urge the granting of injunctive relief under Section 10(l) or to oppose the Regional Director's modified request for relief in the district court.

With respect to the Regional Director's first contention, the Court held that while only the Regional Director may *initiate* suits for injunctive relief pursuant to the mandatory duty imposed upon him by Section 10(l), whenever he has reasonable cause to believe that one of the sections enumerated therein has been violated, that once he has done so, no statutory provisions or policy inhibits the charging parties' *right* to urge the granting of injunctive relief. So long as the urging of the charging parties is consistent with the facts, theories and relief sought in the petition, they may actively *support* it despite any subsequent attempted change of position by the Regional Director. The distinction between "initiate" and "support" was found to be critical. Accordingly, the Ninth Circuit held that district courts may grant injunctions at the urging of charging parties and over the objection of the Regional Director, in cases under Section 10(l):

> ". . . where the charging parties did not petition the court independently or for relief different than that sought by the Regional Director, *but merely supported the original petition for injunctive relief requested by the Regional Director.*" (Emphasis added.)

The Regional Director's second appellate contention, in which he attacked the charging parties' standing to object to his decision to seek a lesser remedy than an injunction despite the pendency of his petition, was found to be equally non-meritorious. The Ninth Circuit expressly held the language of Section 10(l), in which charging parties are guaranteed the right to notice, to participation by counsel, and to an equal role in the development of rele-

vant evidence in district courts, as sufficient to confer such standing. Moreover, the court reached the same conclusion less directly when it stated that district courts should grant appropriate relief in injunction suits under Section 10(l), whether or not the Regional Director persists in seeking such relief after he files his petition. However, if the Regional Director does not seek the injunction, the district court cannot grant it *sua sponte*. It follows, therefore, that once the Board's petition is on file, charging parties must have standing to urge such relief *independently* of the Regional Director if the district court is to have an option to grant it in the event of the Regional Director's change of position.

In summary, the Ninth Circuit's decision in *Retail Clerks* constitutes persuasive precedent for the propositions that charging parties in cases under 10(l) have the right to be heard in the district court to urge the granting of injunctive relief, in support of and pursuant to the Regional Director's pending petition, whether or not the Regional Director continues to seek such relief. Similarly, they have standing to object and to meaningful hearing on their objections to his refusal to persist in his efforts to secure such relief or to his decision to seek lesser relief. The right to make and be heard on these objections necessarily implies that the charging parties are entitled to the holding of a hearing on those objections despite the Regional Director's desire to dispense with such a hearing and to accept other and lesser than injunctive relief. And the combination of these rights should be understood to confer on charging parties the right to participate as full party-litigants in proceedings under Section 10(l), either directly or through intervention; those are the rights which are

commonly exercised only by "parties", and there are no further or greater rights which could meaningfully be exercised within the statutory scheme of the Act.[31]

---

31. While the entire thrust of the Court's decision in *Retail Clerks* is that charging parties, under Section 10(1), possess the rights of and function as "parties"—particularly the Court's suggestion that their status under Section 10(1) is analogous to their status before the Board itself where they exercise precisely the same rights and are recognized as "parties"—nonetheless the Court did not permit them to intervene but relegated them to the status of *amici*. This result does seem inconsistent with all the discussion and analysis which preceded it. It may well be that the Court, having determined to approve the granting of relief requested by the charging parties, chose not to decide the tangential and unnecessary question of legal status which had, in any event, not been litigated in those terms.

In any event, the *Retail Clerks* case was decided before *Scofield*, one of whose points was precisely that charging parties are entitled to exercise a greater role than that of *amici curiae* in the judicial consideration of their vital interests; it was also decided *before Association of Data Processing, Barlow* v. *Collins*, and *Arnold Tours* v. *Camp, supra*. Given the inherent logic of *Retail Clerks*, it seems fair to conclude that had the Court had the benefit of these authorities at the time it rendered its decision, it would, at least, have granted intervention by the charging parties. Indeed, it is submitted that the Court would have been compelled to do so.

Conclusion.

For the foregoing reasons, it is respectfully urged that this petition for writ of certiorari should be granted.

Respectfully submitted,

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
Attorney for Petitioner, Sears, Roebuck and Co.

JERRY KRONENBERG,
MURRAY F. BAHM,
BOROVSKY, EHRLICH & KRONENBERG,
120 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Petitioners, Terminal Freight Cooperative Association and Terminal Freight Handling Company.

Of Counsel:
ALAN RAYWID,
COLE, ZYLSTRA & RAYWID,
2011 Eye Street, N. W.,
Washington, D. C. 20006,

LAWRENCE M. COHEN,
LEDERER, FOX & GROVE,
111 West Washington Street,
Chicago, Illinois 60602,

D. J. SULLIVAN,
LEWIS, RICE, TUCKER, ALLEN & CHUBB,
1555 Railway Exch. Bldg.,
611 Olive Street,
St. Louis, Missouri 63101,

GERALD TOCKMAN,
1153 Pierre Laclede Building,
7701 Forsythe Boulevard,
St. Louis, Missouri 63105.

APPENDIX.

UNITED STATES DISTRICT COURT
For the Eastern District of Missouri
Eastern Division

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Petitioner,* *vs.* MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondent.*	Civil No. 70 C 317(2)

PETITION FOR INJUNCTION UNDER SECTION 10(l) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED.

To the Honorable, the Judges of the United States District Court for the Eastern District of Missouri, Eastern Division:

Comes now Joseph H. Solien, Regional Director of the Fourteenth Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(l) of the

National Labor Relations Act, as amended, (61 Stat. 149; 73 Stat. 544; 29 U. S. C. Sec. 160(l); herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on a charge alleging that Respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(b)(4)(i)(ii)(B) of the Act. In support thereof, petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Fourteenth Region of the Board, an agency of the United States and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(l) of the Act.

3(a). On or about June 10, 1970, Sears, Roebuck and Co., (hereinafter called Sears) pursuant to the provisions of the Act, filed a charge with the Board alleging that Miscellaneous Drivers and Helpers Union, Local No. 610, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a labor organization (hereinafter called Respondent), has been and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) of the Act. An amended charge was filed on June 23, 1970. Copies of said charges are attached hereto as Exhibits 1 and 2, respectively, and made a part hereof.

(b) On or about June 12, 1970, Terminal Freight Cooperative Association (hereinafter called the Association), Terminal Freight Handling Company (hereinafter called Handling Company), and May Department Stores Company (hereinafter called May), pursuant to the provisions of the Act, filed a charge with the Board alleging that Respondent has been and is engaging in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) of

the Act. A copy of said charge is attached hereto as Exhibit 3 and made a part hereof.

4. The aforesaid charges were referred to Joseph H. Solien as Regional Director of the Fourteenth Region of the Board.

5. Upon the basis of the following, petitioner has reasonable cause to believe that said charges are true and that complaints of the Board based on said charges should issue against Respondent pursuant to Section 10(b) of the Act. More particularly, petitioner has reasonable cause to believe, and believes, that Respondent is a labor organization within the meaning of Sections 2(5), 8(b) and 10(l) of the Act, and that said Respondent has been and is engaging in, acts and conduct in violation of Section 8(b)(4)(i)(ii)(B) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) Respondent maintains its principal office at 300 South Grand Boulevard, St. Louis, Missouri, and, at all times material herein, has been and is engaged within this judicial district in transacting business and in promoting and protecting the interests of its employee members.

(c) Sears is a corporation with an office and places of business in various states of the United States including the States of Missouri and Illinois, where it is engaged in the business of retail sales of clothing, furniture, tools, electrical appliances, sporting goods and other merchandise. In the operation of its business Sears annually receives goods and merchandise in Missouri, directly from points outside the State of Missouri, valued in excess of

$50,000, and annually receives goods and merchandise in Illinois, from points outside the State of Illinois, valued in excess of $50,000. Sears annually sells merchandise valued in excess of $500,000.

(d) Be-Rite Delivery Service, Inc., (herein called Be-Rite) is a corporation having offices and places of business at 1911 Locust and 1024 South Vandeventer in the City of St Louis, and at 8950 Pershall, Hazelwood, all in the State of Missouri. Be-Rite is engaged in business as a delivery service, delivering goods, wares and merchandise for Sears and other persons in the Metropolitan Area of the City of St. Louis. In the course and conduct of its business operations, Be-Rite annually performs delivery services for Sears valued in excess of $50,000.

(e) Association is a non-profit shipper association consisting of 46 companies, including May, Boeing Company, Broadway-Hale Stores, North American Rockwell Corporation, Whirlpool Company, General Dynamics Corporation and Sears, which receives less-than-carload and less-than-truckload shipments, consolidates such shipments into carload lots and reships such goods to members' places of business at various locations throughout the United States. Members of the Association, individually and collectively, have annual gross sales in excess of $500,000, and each receives and ships goods valued at in excess of $50,000, in interstate commerce throughout the several states of the United States.

(f) Handling Co. is a non-profit Delaware corporation engaged in the handling, consolidation and trans-shipment of freight as manager of the Association. It operates 36 terminal facilities in 24 states and the District of Columbia, including a terminal at 924 Cerre Street, in St. Louis, Missouri. It has annual receipts of more than $1 million derived from services supplied in connection with the movement of freight in interstate commerce.

(g) May is a retail department store enterprise. In the operation of its retail business May annually sells goods, wares and merchandise valued in excess of $1 million and in the same period purchases from suppliers located in states other than the State of Missouri, goods, wares and merchandise valued in excess of $50,000, which were transported from said other states directly to May's facilities in the State of Missouri.

(h) At no time material herein has Respondent Union had any labor dispute with Sears, the Association, Handling Co. or May.

(i) At all times material herein Respondent Union has had a labor dispute with Be-Rite concerning the wages, hours, terms and conditions of employment of Be-Rite's employees.

(j) Since on or about June 9, 1970, Respondent in furtherance of its dispute with Be-Rite referred to in subparagraph (i) above, has picketed at stores of Sears located at 1408 North Kingshighway, 3708 South Grand, 15 Crestwood Plaza, 490 Northwest Plaza, 7412 Manchester Avenue, at Sears' warehouses at 8950 Pershall or 1024 South Vandeventer, all in the Metropolitan Area of the City of St. Louis, in the State of Missouri, and at Sears' stores at 1001 State Street in East St. Louis, Illinois, and at 409 Piasa in Alton, Illinois.

(k) Commencing on or about June 10, 1970, Respondent, in furtherance of its dispute with Be-Rite, picketed Association, Handling Co. and Sears in the vicinity of 924 Cerre Street, St. Louis, Missouri.

(l) As a result of Respondent's acts and conduct referred to in subparagraph (j) above, employees of Sears and employees of other persons in commerce or an industry affecting commerce, ceased working during the period such picketing was conducted and have refused to perform services for their respective employers.

(m) As a result of Respondent's acts and conduct referred to in subparagraph (k) above, employees of Association, Handling Co., May and other persons in commerce or in an industry affecting commerce ceased working during the time such picketing was conducted and have refused to perform services for their respective employers.

(n) By the acts and conduct set forth in subparagraphs (j) and (k) above, Respondent has engaged in and has induced and encouraged individuals employed by Sears, the Association, the Handling Co. and May and other persons engaged in commerce or in an industry affecting commerce to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport or otherwise handle or work on goods, articles, materials or commodities or to perform services and has threatened, coerced and restrained Sears, the Association, the Handling Co. and May and other persons engaged in commerce or in industries affecting commerce.

(o) Objects of the Acts and conduct of the Respondent set forth in subparagraphs (j) and (k) above were, and are: (1) to force or require the Association, the Handling Co., and other persons engaged in commerce or in an industry affecting commerce, to cease doing business with Sears; and (2) to force and require Sears to cease doing business with Be-Rite.

6. It may fairly be anticipated that, unless enjoined, Respondent will continue or repeat the acts and conduct set forth in paragraph 5, subparagraphs (j) and (k), above, or similar or like acts and conduct in violation of Section 8(b)(4)(i)(ii)(B) of the Act. It is therefore essential, appropriate, just and proper, for the purpose of effectuating the policies of the Act, and in accordance with the provisions of Section 19(l) thereof, that, pending final disposition of the matters involved herein pending before

the Board, Respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

WHEREFORE, petitioner prays:

1. That the Court issue an order directing Respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, pending the final disposition of the matters involved herein pending before the Board, from:

(a) picketing at or in the vicinity of Sears' retail stores at 1408 North Kingshighway, 3708 South Grand, 15 Crestwood Plaza, 490 Northwest Plaza, 7412 Manchester Avenue, or at Sears, warehouses at 895 Pershall or 1024 South Vandeventer, all in the Metropolitan Area of the City of St. Louis, in the State of Missouri, or at Sears' stores at 1001 State Street in East St. Louis, Illinois, and 309 Piasa in Alton, Illinois.

(b) picketing at or in the vicinity of the premises known and numbered as 924 Cerre Street in the City of St. Louis and State of Missouri.

(c) in any manner or by any means including picketing, orders, directions, instructions, requests or appeals, however given, made or imparted or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Sears, the Association, Handling Co. and May or by any other person engaged in commerce or in an industry affecting commerce to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work

on any goods, articles, materials or commodities or to perform any service, or in any manner or by any means threatening, coercing or restraining Sears, the Association, Handling Co. and May or any other person engaged in commerce or an industry affecting commerce where in either case an object thereof is to force or require Sears, the Association, Handling Co. and May or any other person to cease using, selling, handling, transporting or otherwise dealing in the products of or to cease doing business with Be-Rite.

2. That upon return of said Order to Show Cause, the Court issue an Order enjoining and restraining Respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and proper in the premises.

Dated at Saint Louis, Missouri, this 29th day of June 1970.

/s/ JOSEPH H. SOLIEN
Joseph H. Solien, Regional Director
National Labor Relations Board
Fourteenth Region

ARNOLD ORDMAN,
General Counsel

DOMINICK L. MANOLI,
Associate General Counsel,

JULIUS G. SEROT,
Assistant General Counsel,

GERALD P. FLEISCHUT,
Regional Attorney,

/s/ JOHN S. STEVENS
John S. Stevens, Attorney
National Labor Relations Board
1040 Boatmen's Bank Building
314 North Broadway
St. Louis, Missouri 63102
MAin 2-4154

EXHIBIT 1.

FORM NLRB-501 (10-68)

Form Approved
Budget Bureau No. 64-R010.11

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 14-CC-603

Date Filed June 10, 1970

1. a. Name: Miscellaneous Drivers and Helpers Union, Local No. 610, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

b. Union Representative to Contact: William Kneist, Business Representative

c. Phone No.: 389-2575

d. Address (Street, city, State and ZIP code): 300 South Grand Boulevard, St. Louis, Missouri 63103

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (4)(i)(B) (4)(ii)(B) (5) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

The above-named labor organization, by its officers, agents and representatives, since on or about June 9, 1970, and continuing to date, has induced or encouraged individuals employed by persons engaged in commerce or in an industry affecting commerce to refuse in the course of their employment to transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, and has threatened, coerced or restrained persons engaged in commerce or in an industry affecting commerce where in either case an object thereof is to force or require Sears, Roebuck and Co., at the locations listed on the attachment, to cease using the services of Ba-Rite Delivery Service, Inc., or to cease doing business with Ba-Rite Delivery Service, Inc.

3. Name of Employer: Ba-Rite Delivery Service, Inc. Office phone: 621-9522

4. Location of Plant Involved (Street, city, State and ZIP code): 1911 Locust, St. Louis, Missouri 63103; 1024 South Vandeventer, St. Louis, Missouri 63110; 8950 Pershall, Hazelwood, Missouri

5. Type of Establishment (Factory, mine, wholesaler, etc.): local delivery company

6. Identify Principal Product or Service: transportation of goods

7. No. of Workers Employed: 160

8. Full Name of Party Filing Charge: Sears, Roebuck and Co.

9. Address of Party Filing Charge (Street, city, State and ZIP code): 490 Northwest Plaza, St. Ann, Missouri

10. Telephone No.: main office AX 1-1000

11. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By: [signature] (Signature of representative or person making charge)

Attorney (Title or office, if any)

Address: Chicago Title and Trust Building, 111 West Washington Street, Chicago, Illinois 60602

312-641-0200 (Telephone number)

June 10, 1970 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

KJB/jf

Miscellaneous Drivers and Helpers Union,
Local No. 610, a/w International Brotherhood
of Teamsters, Chauffeurs, Warehousemen and
Helpers of America
(De-Rite Delivery Service, Inc.)
Case No. 14-CC-603

June 10, 1970

Attachment

Locations of Sears, Roebuck and Co. involved:

1408 North Kingshighway, St. Louis, Missouri 63113

3708 South Grand Boulevard, St. Louis, Missouri 63118

15 Crestwood Plaza, Crestwood, Missouri

490 Northwest Plaza, St. Ann, Missouri

1001 State Street, East St. Louis, Illinois

7412 Manchester, Maplewood, Missouri 63143

1024 South Vandeventer, St. Louis, Missouri 63110

8950 Pershall, Hazelwood, Missouri

309 Piasa, Alton, Illinois

EXHIBIT 2.

FORM NLRB-501 (12-69)

Form Approved Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

AMENDED CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 14-CC-603

Date Filed June 23, 1970

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name: Local No. 610, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

b. Union Representative to Contact: William White, Business Representative

c. Phone No.: 289-2525

d. Address (Street, city, State and ZIP code): 300 South Grand Boulevard, St. Louis, Missouri 63103

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section 8(b), subsection(s) (4) (i) (ii) (B) (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

The above-named labor organization, by its officers, agents and representatives, since on or about June 9, 1970, and continuing to date, has induced or encouraged individuals employed by persons engaged in commerce or in an industry affecting commerce to refuse in the course of their employment to transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, and has threatened, coerced or restrained persons engaged in commerce or in an industry affecting commerce where in either case an object thereof is to force or require Sears, Roebuck and Co., at the locations listed on the attachment, to cease using the services of Be-Rite Delivery Service, Inc., or to cease doing business with Be-Rite Delivery Service, Inc.

Since on or about June 19, 1970, the above-named labor organization, by its officers agents and representatives, has induced and encouraged individuals employed by Dependable Service Co. and Action Service Co., persons engaged in commerce or in an industry affecting commerce, to refuse in the course of their employment to perform work and to work on goods, articles and commodities, and has threatened, coerced and restrained persons engaged in commerce or in an industry affecting commerce where an object of all of this activity is to force or require Sears, Roebuck and Co. to cease using the services of Be-Rite Delivery Service, Inc., or to cease doing business with Be-Rite Delivery Service, Inc.

3. Name of Employer: Be-Rite Delivery Service, Inc. — Office phone: 621-9522

4. Location of Plant Involved (Street, city, State and ZIP code): 1911 Locust, St. Louis, Missouri 63103; 8630 Pershall, Hazelwood, Missouri; 1024 South Vandeventer, St. Louis, Missouri 63110

5. Type of Establishment (Factory, mine, wholesaler, etc.): local delivery company

6. Identify Principal Product or Service: transportation of goods

7. No. of Workers Employed: 160

8. Full Name of Party Filing Charge: Sears, Roebuck and Co.

9. Address of Party Filing Charge (Street, city, State and ZIP code): 490 Northwest Plaza, St. Ann, Missouri

10. Telephone No. with Offic: AX 1-1000

11. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ D. J. Sullivan (Signature of representative or person making charge) — Attorney (Title or office, if any)

D. J. Sullivan
Address 1555 Railway Exchange Bldg. — CE 1-5333 (Telephone number) — June 23, 1970 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

JGS

GPO 885-455

Miscellaneous Drivers and Helpers Union,
Local No. 610, a/w International Brotherhood
of Teamsters, Chauffeurs, Warehousemen and
Helpers of America
(De-Rite Delivery Service, Inc.)
Case No. 14-CC-503

June 23, 1970

Attachment

Locations of Sears, Roebuck and Co. involved:

1408 North Kingshighway, St. Louis, Missouri 63113

3708 South Grand Boulevard, St. Louis, Missouri 63118

15 Crestwood Plaza, Crestwood, Missouri

490 Northwest Plaza, St. Ann, Missouri

1001 State Street, East St. Louis, Illinois

7412 Manchester, Maplewood, Missouri 63143

1024 South Vandeventer, St. Louis, Missouri 63110

8950 Pershall, Hazelwood, Missouri

309 Piasa, Alton, Illinois

EXHIBIT 3.

FORM NLRB-508 (12-68)

Form Approved
Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 14-CC-[illegible]

Date Filed 6-12-70

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name	b. Union Representative to Contact	c. Phone No.
Miscellaneous Drivers and Helpers Union, Local No. 610, a/w I.B. of T.C.W. & H. of A.	Wm. Kneist, Bus. Rep.	289-2559

d. Address (Street, city, State and ZIP code)
300 So. Grand Blvd., St. Louis, Missouri 63103

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) [illegible] (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

See Attachment A.

3. Name of Employer Terminal Freight Cooperative Association
Terminal Freight Handling Co.

4. Location of Plant Involved (Street, city, State and ZIP code)
924 Cerre St. St. Louis, Missouri

5. Type of Establishment (Factory, mine, wholesaler, etc.)	6. Identify Principal Product or Service	7. No. of Workers Employed
Warehouse	General Merchandise	5

8. Full Name of Party Filing Charge 1. Terminal Freight Cooperative Association and Terminal Freight Handling Company. 2. May Department Stores Co.

9. Address of Party Filing Charge (Street, city, State and ZIP code)
1. 924 Cerre St. St. Louis, Missouri 63102
2. 6th and Clive Sts. St. Louis, Missouri 63101.

10. Telephone No. GE 1-3151

11. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Jerry Kronenberg (Signature of representative or person making charge) Atty. (Title or office, if any)

Address 111 W. Washington Street, Chicago, Illinois 60602 (Telephone number) 312-236-8987 6/12/70 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 865-460

Attachment A.

The above named labor organization and its agents, beginning on June 10, 1970, and continuing to the present, (i) have engaged in, induced and encouraged individuals employed by Terminal Freight Cooperative Association, Terminal Freight Handling Co., and Pine Transportation Co., persons engaged in commerce and in industries affecting commerce, and other persons so engaged, to engage in a strike or a refusal in the course of their employment to use, process, transport or otherwise handle or work on any goods, articles, materials or commodities shipped to or intended to be shipped to or received by or intended to be received by Famous Barr Stores (a division of May Department Stores Co.), Boyd's Stores, American Biltrite Rubber Co., Venture Stores, Broadway-Hale Stores, City Products, Continental Can, Stix, Baer and Fuller, Van Waters and Rogers, Inc., and Rohr Corp., all members of Terminal Freight Cooperative Association and other members of said Association, or to perform any services for such members; and (ii) have since June 10, 1970, and continuing to the present, threatened coerced and restrained persons, including those named in (i) above, all of whom are persons engaged in commerce or in industries affecting commerce, with the object of forcing or requiring Terminal Freight Handling Co. and Pine Transportation Co. to cease using, handling, transporting or otherwise dealing in the products of Sears, Roebuck and Co. and of other producers, processors or manufacturers, including the persons named in (i) above, and to cease doing business with Sears, Roebuck and Co. and such other persons.

STATE OF MISSOURI
COUNTY OF ST. LOUIS } ss.

I, Joseph H. Solien, being first duly sworn depose and say that I am Regional Director of the Fourteenth Region of the National Labor Relations Board; that I have read the foregoing petition and exhibit and know the contents thereof; that the statements therein made as upon personal knowledge are true and those made as upon information and belief I believe to be true.

/s/ JOSEPH H. SOLIEN
Joseph H. Solien

Subscribed and sworn to before me this ..... day of .....

/s/ PAULA A. IACONA
Notary Public.

(SEAL)

My commission expires: October 31, 1973.

UNITED STATES DISTRICT COURT
Eastern District of Missouri

JOSEPH H. SOLIEN, ETC., *vs.* MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC.	70 C 317(2)

June 30, 1970

MEMORANDUM FOR CLERK.

ENTRY OF APPEARANCE.

Pursuant to Section 10(l) of the National Labor Relations Act, as amended, Sears, Roebuck and Co., the charging party in Case No. 14-CC-603 pending before the National Labor Relations Board, the underlying charge out of which this suit arises, enters its appearance as a party in this suit, by its attorneys.

LEWIS, RICE, TUCKER, ALLEN & CHUBB
By: D. J. SULLIVAN
1555 Railway Exchange Building
611 Olive Street
St. Louis, Missouri 63101
231-5833

MEMORANDUM FOR CLERK.

LEDERER, FOX AND GROVE
111 W. Washington Street
Suite 1837
Chicago, Illinois 60602
312-641-0200

GERARD C. SMETANA, ESQ.
925 Homan Avenue
Chicago, Illinois 60607
312-265-5352

UNITED STATES DISTRICT COURT
For the Eastern District of Missouri
Eastern Division

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

} Civil No. 70 C 317(2)

MOTION OF SEARS, ROEBUCK AND CO. TO ACCEPT ITS ENTRY OF APPEARANCE OR, IN ALTERNATIVE, TO INTERVENE.

Sears, Roebuck and Co. ("Sears") respectfully moves that its Entry of Appearance as a party in this suit, which was filed with the Clerk of this Honorable Court on June 30, 1970, be accepted, by virtue of the provisions of Section 10(l) of the National Labor Relations Act, as amended; and that Sears' status as a party to this suit be recognized by the Court. As grounds for this Motion, movant states the following:

(1) This is a suit arising out of unfair practice charges pending before the National Labor Relations Board (NLRB Case No. 14-CC-603);

(2) Sears is the charging party in the underlying proceedings before the Labor Board; and

(3) Under Section 10(l) of the National Labor Relations Act, Sears, as charging party in the administrative proceedings, is entitled to party status in this suit.

In the alternative, Sears respectfully moves, pursuant to Rule 24(e) of the Federal Rules of Civil Procedure, to intervene as of right as a party to this suit, upon the ground that a statute of the United States, namely Section 10(l) of the National Labor Relations Act, as amended, confers an unconditional right on Sears to intervene as a party herein.

Sears requests that the Court consider in connection with this Motion, its Memorandum in Support of Motion simultaneously filed herewith.

LEWIS, RICE, TUCKER, ALLEN & CHUBB
By D. J. SULLIVAN
1555 Railway Exchange Building
611 Olive Street
St. Louis, Missouri 63101
231-5833
Attorneys for Sears, Roebuck and Co.

UNITED STATES DISTRICT COURT
For the Eastern District of Missouri
Eastern Division

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL No. 610, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

} Civil No. 70 C 317(2)

MOTION TO APPEAR AND PARTICIPATE AS FULL PARTIES LITIGANT.

Come now, Terminal Freight Handling Company, hereinafter referred to as Terminal Freight, and Terminal Freight Cooperative Association, hereinafter referred to as Terminal Association, by their attorneys, who respectfully move that this Court permit the movants herein to appear in the above entitled cause and fully participate as parties and in support of this Motion, state as follows:

1. Terminal Freight is a Delaware corporation, author-

ized to do business in the State of Missouri, with its place of business located at 924 Cerre Street, St. Louis, Missouri.

2. Terminal Association is a not for profit association, authorized to do business in the State of Missouri, with its place of business also located at 924 Cerre Street, St. Louis, Missouri.

3. The unlawful acts of picketing by the Miscellaneous Drivers and Helpers Union, Local No. 610, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the "union," have been and are violative of the National Labor Relations Act, 29 U. S. C. Section 151, et seq. and are directed at the terminal and place of business of Terminal Freight and Terminal Association located at 924 Cerre Street, St. Louis, Missouri.

4. The Regional Director of the Fourteenth Region of the National Labor Relations Board has brought the above entitled action pursuant to the National Labor Relations Act, 29 U. S. C. Section 160(l) because he has investigated a charge that the union has engaged in an unfair labor practice and has reasonable cause to believe that said charge is true.

5. The National Labor Relations Act, 29 U. S. C. Section 160(l) authorizes this Court to grant such injunctive relief or temporary restraining order as it deems just and proper, and also confers upon the charging party, here Terminal Freight and Terminal Association, the right to appear by counsel and present relevant evidence.

6. The unlawful picketing of the union has substantially interfered with the operations of Terminal Freight and Terminal Association.

7. That Terminal Freight and Terminal Association are vitally concerned with securing injunctive relief to prohibit any and all unlawful picketing at their place of business.

8. That it is necessary for Terminal Freight and Terminal Association to participate in the above entitled action as full parties litigant as authorized by the National Labor Relations Act. See also *Retail Clerks Union, Local 137 et al.* v. *Food Employers' Council, Inc.*, 351 P. 2d 525 (9th Cir. 1965).

9. That in the event Terminal Freight and Terminal Association are not permitted to participate as full parties litigant, their ability to protect their interest from unlawful picketing may be impaired or impeded. See *e.g. Sears, Roebuck and Company* v. *Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419,* 410 F. 2d 1148 (10th Cir. 1969, judgment vacated and complaint dismissed as moot U. S. ..... S. Ct., No. 419 (Apr. 27, 1970) also reported at 74 LRRM 2001).

WHEREFORE, Terminal Freight and Terminal Association respectfully pray that this Court permit them to enter, appear and participate as full parties litigant in the above entitled action.

Attorneys for Plaintiffs

BOROVSKY, EHRLICH &
KRONENBERG
111 West Washington Street
Chicago, Illinois

McMAHON & BERGER
1153 Pierre Laclede Building
7701 Forsyth Boulevard
St. Louis, Missouri

By: /s/ LAWRENCE D. EHRLICH
By /s/ JERRY KRONENBERG
Jerry Kronenberg
By .....
Gerald Tockman

(Dated: July 1, 1970)

UNITED STATES OF AMERICA
Before the National Labor Relations Board
Fourteenth Region

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL No. 610, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, (Be-Rite Delivery Service, Inc.) and SEARS, ROEBUCK AND CO.,	Case No. 14-CC-603
MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL No. 610, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING COMPANY AND MAY DEPARTMENT STORES, INC.	Case No. 14-CC-604

ORDER CONSOLIDATING CASES, COMPLAINT AND NOTICE OF HEARING.

It having been charged in Case No. 14-CC-603 by Sears, Roebuck and Co., herein sometimes called Sears, that Miscellaneous Drivers and Helpers Union, Local No. 610, affili-

ated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein sometimes called Respondent, and in Case No. 14-CC-604 by Terminal Freight Cooperative Association and Terminal Freight Handling Company and May Department Stores, Inc., that Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U. S. C., Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned Regional Director for the Fourteenth Region, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

HEREBY ORDERS, pursuant to Section 102.33 of the Board's Rules and Regulations—Series 8, as amended, that these cases be, and they hereby are, consolidated.

Said cases having been consolidated, the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations—Series 8, as amended, hereby issues this consolidated complaint and notice of hearing and alleges as follows:

1.

The original charge in Case No. 14-CC-603 was filed by Sears on June 10, 1970, and served by registered mail upon Respondent on or about the same date.

The original charge in Case No. 14-CC-604 was filed by Terminal Freight Cooperative Association and Terminal Freight Handling Company and May Department Stores, Inc., on June 12, 1970, and served by registered mail upon Respondent on or about the same date.

The first amended charge in Case No. 14-CC-603 was filed by Sears on June 23, 1970, and served by registered mail upon Respondent on or about the same date.

2.

A. Be-Rite Delivery Service, Inc., hereinafter called Be-Rite, is and has been at all times material herein, a corporation duly authorized to do business in the State of Missouri.

B. At all times material herein, Be-Rite has maintained offices and places of business at 8950 Pershall Road, 1911 Locust and 1024 South Vandeventer in the Metropolitan Area of the City of St. Louis and State of Missouri. Be-Rite is, and has been at all times material herein, engaged in the transportation and distribution of goods, wares and merchandise for Sears.

C. During the year ending June 1, 1970, which period is representative of its operations during all times material herein, Be-Rite, in the course and conduct of its business operations, furnished services to Sears valued in excess of $50,000.

3.

A. Sears is, and has been at all times material herein, a corporation duly authorized to do business in the States of Missouri and Illinois.

B. At all times material herein, Sears has maintained its places of business at 1408 North Kingshighway, 3708 South Grand, 15 Crestwood Plaza, 409 Northwest Plaza, 7412 Manchester, 8950 Pershall and 1024 South Vandeventer, all in the Metropolitan Area of the City of St. Louis and in the State of Missouri. Sears also maintains places of business at 1001 State Street in the City of East St. Louis, Illinois, and 309 Piasa in the City of Alton, Illinois. Sears

is, and has been at all times material herein, engaged in the sale and distribution of clothing, furniture, tools, electrical appliances, sporting goods and other merchandise.

C. During the year ending June 1, 1970, which period is representative of its operations during all times material herein, Sears, in the course and conduct of its business, sold and distributed at retail, goods, wares and merchandise valued in excess of $500,000 at each location in paragraph 3B.

D. During the year ending June 1, 1970, which period is representative of its operations during all times material hereto, Sears, in the course and conduct of its business operations, purchased and caused to be transported and delivered at each of its places of business in the States of Missouri and Illinois in paragraph 3B, clothing, furniture, tools, electrical appliances, sporting goods and other merchandise valued in excess of $50,000 of which goods and materials valued in excess of $50,000, were transported and delivered to each of its places of business in the Metropolitan Area of St. Louis, directly from points located outside the States respectively of Missouri and Illinois.

4.

A. Terminal Freight Cooperative Association (hereinafter called Association) is a nonprofit association, consisting of 46 companies including *inter alia*, May Department Stores, Inc., (hereinafter called May) and Sears.

B. Association is engaged in the business of receiving less-than-carload and less-than-truckload shipments, consolidating such shipments into carload lots and reshipping goods to its members' places of business in various locations throughout the United States.

C. Members of the Association individually have annual gross sales in excess of $500,000, and each such member,

including May and Sears, annually receives goods, wares and merchandise in Missouri valued in excess of $50,000, directly from points located outside the State of Missouri.

5.

A. Terminal Freight Handling Company, (hereinafter called Handling Company) is a nonprofit Delaware corporation authorized to do business in the State of Missouri.

B. Handling Company is engaged in the handling, consolidation and shipment of freight and acts as the manager of Association. It operates 36 facilities in 24 states and the District of Columbia including a terminal at 924 Cerre Street in St. Louis, Missouri.

C. Handling Company annually receives in excess of $1 million from services supplied to members of the Association in connection with the movement of freight in interstate commerce.

6.

A. May is a retail department store enterprise authorized to do business in the State of Missouri.

B. May maintains retail department stores in the Metropolitan Area of the City of St. Louis, each of which stores individually and collectively annually sells goods, wares and merchandise valued in excess of $1 million.

C. May annually purchases from suppliers in states other than the State of Missouri, goods, wares and merchandise valued in excess of $50,000, which goods are shipped from said other states directly to May at each of its facilities in the State of Missouri.

7.

A. Dependable Service Company, (hereinafter called Dependable) has been at all times material herein a corporation authorized to do business in the State of Missouri.

B. Dependable maintains an office and place of business at 1024 South Vandeventer in the City of St. Louis and State of Missouri where it is and has been at all times material herein engaged in the business of repairing electrical appliances.

C. During the year ending June 1, 1970, which period is representative of its operations at all times material hereto Dependable, in the course and conduct of its business operations, furnished services to Sears valued in excess of $50,000.

8.

A. Action Service Company, (hereinafter called Action) is and has been at all times material herein a corporation au orized to do business in the State of Missouri.

B. Action at all times material herein has maintained an office and place of business at 3528 Wismer Street in the City of St. Louis and State of Missouri where it is and has been at all times material herein engaged in the business of repairing electrical appliances.

C. During the year ending June 1, 1970, which period is representative of its operations at all times material herein, Action, in the course and conduct of its business operations, purchased and caused to be delivered to its place of business at 3528 Wismer Street electrical and mechanical parts and appliances valued in excess of $50,000, which parts and appliances were delivered directly to it in the State of Missouri from points located outside the State of Missouri.

9.

Each Be-Rite, Sears, Association, Handling Company, May, Dependable and Action is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and a person in commerce or in an industry affecting commerce within the meaning of Section 8(b) (4) of the Act.

10.

Respondent is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

11.

At no time material herein has Respondent had any labor dispute with Sears, the Association, Handling Company or May.

12.

At all times material herein Respondent Union has had a labor dispute with Be-Rite concerning the wages, hours, terms and conditions of employment of Be-Rite's employees.

13.

A. Commencing on June 9, 1970, Respondent in furtherance of its dispute with Be-Rite referred to in paragraph 12 above has picketed Sears at its stores located at 1408 North Kingshighway, 3708 South Grand, 15 Crestwood Plaza, 490 Northwest Plaza, 7412 Manchester Avenue and at Sears' warehouses at 8950 Pershall and 1024 South Vandeventer, all in the Metropolitan Area of the City of St. Louis and State of Missouri, and at Sears' stores at 1001 State Street in East St. Louis, Illinois, and at 309 Piasa in Alton, Illinois.

B. Commencing on or about June 10, 1970, Respondent in Furtherance of its dispute with Be-Rite referred to in paragraph 12 above picketed Association, Handling Company and May in the vicinity of 924 Ceere Street, St. Louis, Missouri.

14.

Commencing on or about June 9, 1970, and continuing to date, Respondent by its officers, agents and representatives, has engaged and is engaging in and by picketing, requests, appeals, orders, instructions and other means has induced and encouraged and is inducing and encouraging individuals employed by Sears, the Association, Handling Company, May, Dependable, Action and other persons engaged in commerce or in industries affecting commerce to engage in a refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services for their respective employers and has threatened, coerced and restrained Sears, the Association, Handling Company, May, Dependable, Action and other persons engaged in commerce or in industries affecting commerce.

15.

Objects of the acts and conduct of Respondent set forth in paragraphs 13 and 14 above were and are:

A. To force or require the Association, Handling Company, May, Dependable, Action and other persons engaged in commerce or in an industry affecting commerce to cease doing business with Sears.

B. To force and require Sears to cease doing business with Be-Rite.

16.

Respondent by the acts and conduct referred to in paragraphs 13, 14 and 15 above, and by each of said acts, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

17.

The acts of Respondent described in paragraphs 13, 14 and 15 above, occurring in connection with operations of Association, Handling Company, May, Sears and Be-Rite, described in paragraphs 2, 3, 4, 5 and 6, above, have a close intimate and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 27th day of July 1970, at 10 a.m. (CDST), or as soon thereafter as you may be heard, at 1040 Boatmen's Bank Building, 314 North Broadway, St. Louis, Missouri, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person or otherwise, and give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Rela-

tions Board, an original and 4 copies of an answer to said complaint within 10 days from the service thereof and that unless it does so all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at St. Louis, Missouri, this 2nd day of July 1970.

/s/ JOSEPH H. SOLIEN
Joseph H. Solien, Regional Director
Fourteenth Region
National Labor Relations Board
1040 Boatmen's Bank Building
314 North Broadway
St. Louis, Missouri 63102

UNITED STATES DISTRICT COURT
For the Eastern District of Missouri
Eastern Division

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL No. 610, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

} Civil No. 70 C 317(2)

ORDER.

This matter is pending on motions of Sears, Roebuck and Company, Terminal Freight Handling Company, and Terminal Freight Cooperative Association to intervene as full parties in this litigation, and upon the proposed intervenors' objections to a proposed stipulation petitioner and respondent presented to the Court. The Court has been duly advised by briefs of all parties and by oral argument.

IT IS HEREBY ORDERED that the motions of Sears, Roebuck and Company, Terminal Freight Handling Company, and Terminal Freight Cooperative Association to intervene be

and the same are denied. However, these parties will be notified of all actions by the petitioner and respondent in this case, and will be permitted at all times to introduce evidence, appear at hearings, and file briefs and keep the Court advised of any matters that should be brought to the attention of the Court.

IT IS FURTHER ORDERED that the proposed stipulation entered into between the petitioner and respondent is disapproved.

IT IS FURTHER ORDERED that the matter be set down for hearing on Wednesday, July 15, 1970, at 10:00 a.m., at which time the respondent is directed to show cause why a temporary injunction should not be issued.

IT IS FURTHER ORDERED that the Clerk of the Court shall note the names of the attorneys for the proposed intervenors on the docket and they shall be sent copies of all pleadings, memoranda, and orders by the Clerk, and the petitioner and respondent shall also send copies of all pleadings and briefs which they may file to attorneys for the proposed intervenors.

Dated this 8th day of July, 1970.

/s/ James H. Meredith,
United States District Judge.

UNITED STATES DISTRICT COURT
For the Eastern District of Missouri
Eastern Division

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

} Civil No. 70 C 317(2)

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys for the respective parties hereto, subject to the approval of the Court, that:

1. Pending final disposition of the matters presently pending before the National Labor Relations Board (herein called the Board) in connection with charges and amended charges filed by Sears, Roebuck and Co. in Case No. 14-CC-603 and charges filed by Terminal Freight Cooperative Association and Terminal Freight Handling Co. and May Department Stores Company in Case No. 14-CC-604, Respondent Miscellaneous Drivers and Helpers Union,

Local No. 610, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called Respondent), its officers, representatives, agents, servants, employees and all members and persons acting in concert or participation with it will not:

(a) Picket at or in the vicinity of Sears, Roebuck and Co.'s retail stores at 1408 North Kingshighway, 3708 South Grand, 15 Crestwood Plaza, 490 Northwest Plaza, 7412 Manchester Avenue, or at Sears, Roebuck and Co.'s warehouses at 8950 Pershall or 1024 South Vandeventer, all in the Metropolitan Area of the City of St. Louis, in the State of Missouri, or at Sears, Roebuck and Co.'s stores at 1001 State Street in East St. Louis, Illinois, and 309 Piasa in Alton, Illinois.

(b) Picket at or in the vicinity of the premises known and numbered as 924 Cerre Street in the City of St. Louis and State of Missouri.

(c) In any manner or by any means including picketing, orders, directions, instructions, requests or appeals, however given, made or imparted or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engage in, or induce or encourage any individual employed by Sears, Roebuck and Co., Terminal Freight Cooperative Association, Terminal Freight Handling Co. and May Department Stores Company, or by any other person engaged in commerce or in any industry affecting commerce to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any service, or in any manner or by any means threaten, coerce or restrain Sears, Roebuck and Co., Terminal Freight Cooperative Association, Terminal Freight

Handling Co., and May Department Stores Company or any other person engaged in commerce or an industry affecting commerce

where in connection with the acts and conduct set out in subparagraphs (a), (b) and (c) hereof an object thereof is to force or require Sears, Roebuck and Co., Terminal Freight Cooperative Association, Terminal Freight Handling Co., and May Department Stores Company, or any other person to cease using, selling, handling, transporting or otherwise dealing in the products of or to cease doing business with Be-Rite Delivery Service, Inc. or Sears, Roebuck and Co.

2. In the event that the Regional Director for the Fourteenth Region of the Board, after investigation of an alleged breach by Respondent of any of the provisions of paragraph 1 of this Stipulation, thereupon files with the Court an Affidavit stating that he has found probable cause to believe that Respondent has breached the provisions of paragraph 1 of this Stipulation, the Court may, forthwith enter a Temporary Injunction against said Respondent in the form set forth in Exhibit (A) attached hereto. In this connection, Respondent waives a further hearing before the Court, as well as the making of Findings of Fact and Conclusions of Law by the Court.

3. This case shall in the meanwhile remain on the Docket of this Court and upon compliance by Respondent with its obligation undertaken hereunder and upon the final disposition of the matters pending before the Board, as aforesaid, the Petitioner shall cause this proceeding to be dismissed.

4. The making and execution of this Stipulation does not constitute an admission by Respondent that it has engaged in unfair labor practices.

Respondent Miscellaneous Drivers and Helpers Union, Local No. 610, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, by signing this Stipulation, acknowledges receipt of a copy of the petition upon it and fully enters its appearance in Case No. 70C 317(2) now pending before this Court.

Dated at St. Louis, Missouri, this 9th day of July 1970.

/s/ JOHN S. STEVENS
John S. Stevens
Attorney for Petitioner,

/s/ NORMAN W. ARMBRUSTER
Attorney for Respondent.

Approved and so ordered this 9th day of July, 1970.

/s/ JAMES H. MEREDITH
United States District Judge.

UNITED STATES DISTRICT COURT
For the Eastern District of Missouri
Eastern Division

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Petitioner,* *vs.* MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL No. 610, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondent.*	Civil No. 70 C 317(2)

NOTICE OF APPEAL.

Notice is hereby given that Sears, Roebuck and Co. ("Sears"), charging party in the underlying proceedings before the National Labor Relations Board, and maintaining that it is a proper party to this suit, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the Order of this Court entered on July 8, 1970, insofar as that Order denies the motion of Sears to intervene herein, and insofar as the said Order refuses

to accept the Entry of Appearance of Sears as a party and refuses to accord Sears status as a party herein.

LEWIS, RICE, TUCKER, ALLEN & CHUBB
By /s/ D. J. SULLIVAN
155 Railway Exchange Building
611 Olive Street
St. Louis, Missouri 63101
231-5833
Attorneys for Sears, Roebuck and Co., proposed Intervenor and Charging Party in the underlying Labor Board proceeding.

(Dated: July 10, 1970)

UNITED STATES DISTRICT COURT
For the Eastern District of Missouri
Eastern Division

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

} Civil No. 70 C 317(2)

NOTICE OF APPEAL.

Notice is hereby given that Terminal Freight Handling Company ("Terminal") and Terminal Freight Cooperative Association ("Association"), charging parties in the underlying proceedings before the National Labor Relations Board, and maintaining they are parties to this suit, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the Order of this Court entered on July 9, 1970, insofar as that Order denies the motion of Terminal and Association to be made full parties Litigant herein, and insofar as the said Order refuses to accept the appearance and participation of Terminal and

Association as parties and refuses to accord Terminal and Association rights and status as parties herein.

GERALD TOCKMAN
McMAHON & BERGER
7701 Forsyth Blvd., Suite 1153
St. Louis, Missouri 63105

JERRY KRONENBERG
BOROVSKY, EHRLICH AND KRONENBERG
111 West Washington Street
Chicago, Illinois 60602

Attorneys for Terminal Freight Handling Company and Terminal Freight Handling Association, proposed parties-intervenors and charging Parties in the underlying Labor Board proceedings.

(Dated: July 16, 1970)

UNITED STATES COURT OF APPEALS.

For the Eighth Circuit.

Nos. 20,407 and 20,418.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on Behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee,

vs.

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent-Appellee,

and

SEARS, ROEBUCK AND CO.,

and

TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING CO.,

Appellants.

Appeals from the United States District Court for the Eastern District of Missouri.

[March 12, 1971.]

Before GIBSON and BRIGHT, *Circuit Judges*, and MCMANUS, *District Judge*.

GIBSON, *Circuit Judge.*

The question presented in this consolidated appeal is whether a charging party in an unfair labor practice complaint before the National Labor Relations Board under § 8(b)(4)(B) of the National Labor Relations Act, 29 U. S. C. § 158(b)(4)(B), which requires the Board Regional Director to file for injunctive relief under § 10(l),[1] is entitled to the status of a full party litigant in the district court injunctive proceeding. And if not, is the charging party entitled to intervene as of right in that proceeding?

The appellants, Sears, Roebuck and Company, Terminal Freight Cooperative Association and Terminal Freight Handling Company,[2] filed separate charges with the Regional Director of NLRB alleging that the appellee Union (respondent below) was conducting an illegal secondary boycott against the appellants in violation of § 8(b)(4)(B). After determining that the complaint should issue, the Director filed for injunctive relief in the District Court pursuant to § 10(l).[3] Appellants sought to appear as full party litigants or, alternatively, to intervene in the injunctive proceeding. The Regional Director as petitioner and the respondent Union in the injunctive proceeding opposed

1. All section references, unless otherwise indicated, refer to the National Labor Relations Act, as amended.

2. Terminal Freight Handling Company was a co-charging party with Terminal Freight Cooperative Association. Both will hereinafter be referred to as "Terminal."

3. Prior to the filing of the Director's petition for injunctive relief, both Sears and Terminal had filed a complaint seeking to compel the Director to file a petition for injunctive relief against the Union. After the filing of the Director's petition, Sears withdrew its complaint while Terminal moved only for a partial dismissal of its complaint (insofar as it sought to compel the Director to file for affirmative injunctive relief), and then amended its complaint to seek a declaratory judgment on the propriety both of the Director's initial refusal to proceed and of the still-existing internal agency rule which dictated or permitted his initial refusal to act. This case is currently pending in the District Court.

the appellants appearing as full party litigants or intervening as parties on the stated ground that § 10(l) did not accord to charging parties full rights as party litigants in the injunctive proceeding.

The District Court, Chief Judge James H. Meredith, denied the appellants full party status and denied them the right to intervene. However, appellants were permitted a limited appearance: the right to be present with counsel at the hearings, to introduce evidence, to file briefs, to be informed of all actions taken in the case, to keep the court advised of pertinent developments and to receive copies of all documents filed.

The Regional Director, as petitioner in the injunctive proceeding, reached a unilateral settlement stipulation in lieu of injunctive relief with the respondent Union over the objection of the charging parties, the appellants in this appeal. The Court required certain modifications in the settlement stipulation and then approved the stipulation as revised on July 9, 1970.

The Court-approved revised settlement stipulation is thought by the appellants to be inadequate for many reasons and from their viewpoint it might well be. However, the sufficiency or merits of the stipulation are not now before this court nor are the merits of the unfair labor practice charges pending before the Board. The only issue presented on this appeal is the propriety of the District Court's order denying full party status to the appellants in the § 10(l) proceeding.[4]

Following the approval of the revised stipulation in lieu of injunctive relief, the Board sought to dispose of

4. The appellants' request for a stay of the District Court's order approving the stipulation in lieu of injunctive relief pending appeal was first granted by this Court and then vacated on August 12, 1970. Appellants filed a petition for certiorari on this issue, which petition was denied by the Supreme Court on January 12, 1971.

the basic complaint against the Union for unlawful secondary boycott and picketing activity by means of a settlement stipulation purporting to remedy the charged unfair labor practice. On July 17, 1970, appellants filed a complaint in the District Court alleging that the Director had violated their rights under the Act and the Board's rules and regulations by excluding them from settlement discussions and depriving them of essential facts in connection with settlement deliberations, and sought to enjoin the Director from approving any settlement or engaging further in settlement discussions without the informed participation of the charging parties. On July 30, the District Court sustained the Director's motion to dismiss that cause for lack of jurisdiction. The charging parties appealed and sought a temporary stay of the District Court decision pending resolution of the appeal, which is now pending in a separate proceeding. This court granted the stay on August 7, but upon further consideration, vacated the stay on August 10.

On August 11, the charging parties filed in the United States Supreme Court an application for a temporary restraining order staying the District Court's order and temporarily enjoining the Director. This application was denied on August 19. Consequently, the settlement stipulation reached by the Regional Director and the Union dated July 24 is presently before the General Counsel for approval.

I.

We first consider the Union's contention that the issue of the charging party's status in § 10(l) proceedings is now moot since the dispute between the Union and the primary employer Be-Right Company has been settled and there is no longer any strike or picketing activity of any kind. The Board at oral argument urged that the case in

its present posture is not moot since the General Counsel has not yet approved the settlement stipulation reached by the Regional Director and the Union concerning the unfair labor practice charged. We agree with the Board.[5]

We do not think this case is moot because the probability of repetition of unlawful secondary boycott activity by the Union in the instant case is sufficient to satisfy the "mere possibility" test articulated in *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953). In our view, a case is justiciable "if there is a possibility that the challenged activity will recur and if it is possible that the challenging party will be affected should recurrence take place. . . ." Comment, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672, 1690 (1970). *See Diamond* v. *Bland*, ... Cal. Rptr. ....., ... P. 2d ..... (En banc No. 29803, Dec. 16, 1970). *Cf. Moore* v. *Ogilvie*, 394 U. S. 814 (1969); *Southern Pac. Terminal Co.* v. *ICC*, 219 U. S. 498 (1911). Nonetheless, we are cognizant that should the pending settlement stipulation be approved by the

5. In *Samoff* v. *International Association of Machinists District Lodge No. 1*, 420 F. 2d 952 (3d Cir. 1969), the Third Circuit held the execution of a collective bargaining agreement mooted an appeal on a similar issue. We are not disposed to follow this holding as we think it is contrary to the teachings of the Supreme Court in *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953):

> "[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. • • • A controversy may remain to be settled in such circumstances, • • • *e.g.*, a dispute over the legality of the challenged practices. • • • The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." (Citations and footnote omitted.)

See also Parham v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421, 426 (8th Cir. 1970); *Bakery Sales Drivers Union* v. *Wagshal*, 333 U. S. 437, 442 (1948); *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U. S. 563, 567 (1950); *NLRB* v. *Raytheon Co.*, 398 U. S. 25 (1970).

General Counsel prior to our decision, these proceedings would be mooted under the holding of *Sears, Roebuck & Company* v. *Carpet Layers Local Union No. 119,* 397 U. S. 655 (1970). However, we feel in this case there are cogent reasons for passing upon the merits of the appeal even should the pending settlement stipulation be so approved. We are impressed with the argument of appellants that the alleged errors committed in the § 10(l) proceedings are inherently evasive of review since it is not feasible to perfect and obtain an appellate review prior to the Board's "final adjudication." Consequently, since we believe that the doctrine of mootness should not be used to perpetually frustrate judicial review of issues of public importance arising in otherwise justiciable cases, the following comments are appropriate:

> "If the Court is confronted with a substantial likelihood that an issue it believes moot will always arrive there in the same condition because of the inherent nature of the issue, the Court should not refuse review on the basis of mootness. The policy overrides the first policy of ensuring the effective functioning of the adversary system, so demonstration of the litigants' personal stake should not be required. The Court must acknowledge that the real choice is not between taking or not taking risks with the quality of the judicial process, but between securing or not securing the values of appellate review—stability, uniformity, and objectivity."
>
> 83 Harv. L. Rev. at 1692 (footnote omitted).

We conclude that these appeals are not moot; furthermore, the policy of ensuring judicial review of issues of public importance which are inherently evasive of review compels us not to refuse review on the basis of mootness. *See ITT Lamp Division of the Int'l Telephone & Telegraph Corp.* v. *Minter,* ..... F. 2d ..... (1st Cir. Nos. 7720 and 7749, Dec. 4, 1970).

We next proceed to the merits of the appeal. Section 10(l) of the Act provides that when a charge is filed alleging an illegal secondary boycott, the Board's regional official shall give priority to the investigation of the charge and if, after investigation, the officer or regional attorney "has reasonable cause to believe such charge is true and that a complaint should issue," he shall petition the federal district court on behalf of the Board "for appropriate relief pending the final adjudication of the Board with respect to such matter." The statutory language on its face draws a distinction between the status to be afforded a labor organization against whom injunctive relief is sought by the Board and the charging party. Section 10(l) provides that service of legal process upon certain officers and agents of the union "shall constitute service upon the labor organization and make such organization a party to the suit." However, as to "any person involved in the charge," including the charging party, § 10(l) requires only that such person be served with notice of the filing of a § 10(l) petition and be "given an opportunity to appear by counsel and present any relevant testimony. . . ."[6]

The Board's position in opposing full party status to charging parties in a § 10(l) proceeding for injunctive

6. Section 19(l) in pertinent part reads:

"(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, * * * the preliminary investigation of such charge shall be made forthwith. . . . If, after such investigation, the officer or regional attorney . . . has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition [the appropriate] United States district court . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . . ."

relief is based primarily upon the wording of § 10(l) and its legislative history. It is clearly stated that only the Board can petition for § 10(l) injunctive relief, and the Board can only petition when an unlawful secondary boycott or jurisdictional strike is charged and its designated officer or regional attorney "has reasonable cause to believe such charge is true." The injunctive proceedings are ancillary to the main unfair labor practice proceeding filed under § 10(a) through (d) of the Act, which is committed solely to the Board for its determination subject to right of appellate review. The district court's function in the § 10(l) ancillary proceeding is limited to determining whether there is reasonable cause to believe that the unfair labor practice charge will be sustained before the Board and whether temporary injunctive relief would be just and proper under the circumstances. If the district court concludes that injunctive relief or a temporary restraining order is just and proper, it may grant such relief "pending the final adjudication of the Board with respect to" the unfair labor practice charged. The findings of the district court in a § 10(l) proceeding are not binding on the Board in deciding the case on the merits or on the Court of appeals in reviewing the Board's decision under § 10(e) and § 10(f) of the Act. *NLRB* v. *Denver Building Council,* 341 U. S. 675 (1951); *McLeod* v. *Local 25, Int'l Brotherhood of Electrical Workers,* 344 F. 2d 634 (2d Cir. 1965). Thus, a § 10(l) injunction is effective only during the pendency of the administrative proceedings and is not a final adjudication of the parties' rights on the merits.

The legislative history of § 10(l) makes clear that the power *to initiate* the injunction suit is restricted to the

Board alone.[7] The courts have uniformly recognized this congressional mandate. *Bakery Sales Drivers Union* v. *Wagshal*, 333 U. S. 437, 442 (1948). The only remedy allowed a private party at his own instance is a suit for damages under § 303 of the Act, 29 U. S. C. § 187.

Appellants claim this legislative history is irrelevant to the question before us because they conceded that charging parties cannot institute the injunction proceeding authorized under § 10(l). The ultimate question is the nature of the role charging parties may play in those proceedings *after* they have been instituted by the Board, and appellants contend that there is no basis to conclude that one whose vital interests are involved in a suit is precluded from functioning as a party therein because the right to institute is limited to another. It is urged that construing the statute to allow charging parties to appear as parties with a right to seek review of adverse judicial decisions would not be incompatible with the Board's position that it should retain substantial control of the proceedings.[8] Appellants further reason that since charging parties have

7. On the Senate floor, Senator Ball of Minnesota proposed an amendment to the proposed § 10(l) which would have allowed the injured party "suffering from a secondary boycott or jurisdictional strike * * * the right to go directly into a district court and seek injunctive relief." 93 Cong. Rec. 4835 (1947). Thereafter, Senator Taft of Ohio proposed that the language of the Senate bill authorizing the Board alone to obtain injunctive relief be retained and that the charging party be given instead the "right to sue for damages." 93 Cong. Rec. 4843-4844 (1947). The Ball amendment was subsequently defeated by a vote of 62 to 28. 93 Cong. Rec. 4847 (1947).

8. Appellants argue that the Board's control is evident in that only the Board can determine whether proceedings under § 10(l) should be instituted; only the Board can institute them; and only the Board can determine which violations of the law are sufficient under the statute and what relief is appropriate in order to remedy the violations.

party status in all proceedings before the Board,[9] whether expressly provided by Congress or not, Congress' failure to specifically label charging parties as parties in § 10(l) proceedings is no basis for holding they do not have such status. *UAW Local 238* v. *Scofield,* 382 U. S. 205 (1965) is relied upon for the principle of statutory construction that the failure of Congress to explicitly articulate certain rights does not evidence a congressional intent that such rights do not exist.

We think the attempt to interpret § 10(l) so as to accord charging parties full party status in a § 10(l) proceeding fails because of lack of legislative support. While there exist cogent reasons why charging parties should be accorded full party status, these reasons should be addressed to Congress, the policy making branch of the government. In enacting § 10(l), Congress created a narrow exception to the Norris-La Guardia Act in allowing injunctions to be issued in labor disputes. While the role of private parties in this facet of the labor law field was considered, such parties were not given the right to privately seek injunctive relief nor were they designated as or given the status of full party litigants. The interpretation argued by appellants twists the plain meaning of the statute as written and is at odds with the overall scheme of injunctive relief embodied in the National Labor Relations Act and the Norris-LaGuardia Act. An apt

9. As charging parties before the NLRB, the appellants are recognized and accorded full party status under the NLRB regulations and thus possess all of the rights usually accorded a party litigant. By filing a charge, the charging party becomes a full party before the General Counsel in the investigative stage, before a Trial Examiner after Complaint has issued and with full appellate rights, before the Board on review of the Trial Examiner's decision, in the Court of Appeals after the Board's decision, and with the right independently to seek certiorari from the Supreme Court. These rights as a full party litigant appearing before the Board were fully recognized in *UAW Local 238* v. *Scofield,* 382 U. S. 205 (1965).

analysis of this point is made in *Sears, Roebuck & Company* v. *Carpet Layers Local No. 419,* 410 F. 2d 1148, 1150 (10th Cir. 1969) (footnote omitted), *vacated as moot,* 397 U. S. 655 (1970):

> "Accordingly, when an exception to that Act, such as is here involved, is relied upon to support the jurisdiction of the court, the language employed to articulate that exception will not be given any more expansive an interpretation than is clearly warranted. Viewed in that context, the limited rights conferred upon a charging party in a § 10(l) proceeding, the right 'to appear by counsel and present any relevant testimony,' must be taken to mean just that, no more and no less. To read into that restricted right of participation, the right to initiate appeals, a right traditionally available only to full party litigants, would not only violate every sound principle of statutory construction, but would require a complete disregard for the sensitivity of the labor injunction problem."

The two cases relied upon by appellants, *UAW Local 238* v. *Scofield,* 382 U. S. 205 (1965) and *Retail Clerks Union* v. *Food Employers Council, Inc.,* 351 F. 2d 525 (9th Cir. 1965), are not particularly helpful to their position. Although the N. L. R. Act does not specifically provide for intervention at the appellate level, *Scofield* held that both the successful charging party and the successful charged party in NLRB proceedings have a right to intervene in the court of appeals' proceeding to review a final Board order. There were two very significant considerations which persuaded the Court to reach that conclusion. Allowing intervention would pervent duplication of appeals and would ensure that a charging party who prevailed before the Board after a full proceeding on the merits could not be deprived of the permanent relief which he sought and obtained through the administrative proceedings without having had an adequate opportunity to present his views.

Appellants contend in the alternative, that if their contention that they have the status of parties in the § 10(l) proceeding is rejected, the rationale of *Scofield* requires that they be allowed to intervene in the district court proceeding since the same private interests are at stake and the same possibility of injury to those vital interests exists. It is asserted that the principle recognized in *Scofield*—that the Board does not have exclusive authority to represent and protect the particular and private interests of charging parties—applies as a matter of logic to all proceedings in all tribunals where those interests are involved and require informed and interested protection.

Professor Moore has answered this contention quite well. He points out that *Scofield* was primarily grounded

> ". . . on the policy of avoiding multiple appeals. That is, if the successful party in the proceeding before the Board were denied participation in the appellate review, and the court of appeals were to reverse the board's decision, the excluded party might later be able to raise a subsequent appeal. . . .
>
> "Where the prevention of multiple appeals is not at stake, the rule should not apply. Thus when the NLRB seeks district court injunctive relief against the respondent, pending Board proceedings, the charging party has no right to intervene." 3B J. Moore, *Federal Procedure* ¶ 24.06[3.-8] (2d. ed. 1969) (footnotes omitted).

We also note that there is no language in § 10(l) comparable to that in § 10(f) relied upon by *Scofield* which would specifically authorize an appeal by the charging party when he is aggrieved by the denial of injunctive relief. There may be some question as to whether Congress recognized the existence of private rights within the § 10(l) injunctive process. *But see Retail Clerks Union,* 351 F. 2d at 529 n. 2. The Senate report commenting on

the proposed § 10(l) (which was substantially in its present form) stated:

> "[W]e have provided that the Board, acting in the *public interest and not in vindication of purely private rights,* may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices." S. Rep. No. 105, 80th Cong., 1st Sess. at 8. (emphasis added.)

We conclude that the charging parties cannot obtain the status of parties in § 10(l) proceedings indirectly through intervention. *See Sears, Roebuck & Co.* v. *Carpet Layers Local No. 419,* 410 F. 2d at 1151; *San Francisco-Oakland Newspaper Guild* v. *Kennedy,* 404 F. 2d 37 (9th Cir. 1968).

Retail Clerks, supra, held that the district court has the power to grant a § 10(l) injunction originally petitioned for by the Regional Director notwithstanding the fact that the latter had meanwhile entered into a stipulation with the respondent union which he believed obviated the need for injunctive relief. The Ninth Circuit based its holding on the ultimate responsibility the district court has under § 10(l) to determine the appropriateness of temporary injunctive relief, reasoning that to hold otherwise would make the court little more than a rubber stamp for the Regional Director. The Court emphasized that its holding was concerned only with the respective roles to be played by the Regional Director and the district court and that it was not defining "the limits of the scope of participation to be permitted the charging parties." 351 F. 2d at 529 n. 2. It should be noted that the appeal was taken by the respondent union and that the court of appeals denied the charging parties' motion to intervene as parties, but granted them permission to appear as amici curiae. It of course follows *a fortiori* that the charging parties did not have full party status in the district court

proceeding since their motions to intervene in the appellate proceedings were denied.

This latter holding of *Retail Clerks* also undercuts appellants' argument that they have a right to intervene in the § 10(l) proceedings as parties because they have an independent right to secure appellate review of the district court ruling. No court that has considered the question of the charging party's independent standing to seek appellate review of an adverse § 10(l) decision has accorded the charging party this right. *Sears, Roebuck & Co.* v. *Carpet Layers Local No. 419, supra; Henderson* v. *Int'l Union of Op. Eng. Local 701,* 420 F. 2d 802, 806 n. 2 (9th Cir. 1969); *see also Kennedy* v. *San Francisco-Oakland Newspaper Guild,* 430 F. 2d 317 (9th Cir. 1970). *But see Houston Insulation Contractors Ass'n* v. *NLRB,* 339 F. 2d 868 (5th Cir. 1964) (2-1 decision involving an appeal from the Board's final order); *McLeod* v. *General Electric Co.,* 366 F. 2d 847 (2d Cir. 1966) (Caption refers to charging parties as intervenors in appeal from grant of § 10(j) injunction, but issue of intervention was not litigated), *judgment set aside and remanded for further proceedings,* 385 U. S. 533 (1967). Appellants' intervention argument based on their alleged right to appellate review of the district court's § 10(l) decision must fall.

Nonetheless, appellants contend that under the tests set out in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U. S. 150 (1970) and *Barton* v. *Collins,* 397 U. S. 159 (1970), charging parties have standing to seek review of the district court's decision on temporary injunctive relief under § 10(l) since they have sustained injuries pursuant to an alleged misapplication of a statute under which they raise their claims. It is asserted that the charging parties were injured here because the stipulation in lieu of injunctive relief approved by the court was not an adequate substitute for injunctive relief.

Both *Data Processing* and *Barlow* presented the question of what interest one must allege in order to establish that he is sufficiently aggrieved by an *administrative* order to be entitled to judicial review under the Administrative Procedure Act, 5 U. S. C. § 701 et seq., of the adverse *agency* action. The decisions in both cases can fairly be said to represent a trend "toward enlargement of the class of people who may protest administrative action" where statutes are concerned. *Data Processing Service,* 397 U. S. at 154. Since we are concerned with the issue of whether charging parties have the right to obtain appellate review from a judicial order in a § 10(l) proceeding and not the right of judicial review of administrative action, *Data Processing Service* and *Barlow* are not controlling.

The final contention made by appellants is that the district court committed reversible error in refusing to permit them to intervene as of right under Rule 24(a)(2), Fed. R. Civ. P., which provides that an applicant shall be permitted to intervene

> ". . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

We disagree. Intervention as of right presupposes that the applicant has a right to maintain a claim for the relief sought, a right which the charging parties clearly do not have. It is also difficult for us to find that the Board, possessed of expertise developed through years of experience and which has independently determined that there is reasonable cause to believe that the secondary boycott charge will be sustained before the Board, will not adequately represent the interest involved. *See Reynolds*

v. *Marlene Industries Corp.*, 250 F. Supp. 722, 724 (S. D. N. Y. 1966).

Judgment of the District Court denying appellants full party status and the right to intervene is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

MISCELLANEOUS DRIVERS AND HELPERS UNION LOCAL No. 610, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (Be-Rite Delivery Service, Inc.) and SEARS, ROEBUCK AND CO.	Case No. 14-CC-603.
MISCELLANEOUS DRIVERS AND HELPERS UNION LOCAL No. 610, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING COMPANY AND MAY DEPARTMENT STORES, INC.	Case No. 14-CC-604.

MOTION TO STAY SUBMISSION OF SETTLEMENT AGREEMENT OR, ALTERNATIVELY, TO STAY PROCESSING OF SETTLEMENT AGREEMENT.

Sears, Roebuck and Co., Terminal Freight Cooperative Association and Terminal Freight Handling Company (hereinafter collectively referred to as the Charging Party) hereby request the Board to stay submission and withhold acceptance of the Stipulation of Formal Settlement referred to it by the General Counsel on March 19, 1971, pending the decision of the Court of Appeals for the Eighth Circuit in *Sears, Roebuck and Co.* v. *Solien* (Nos. 20462 and

20472), or, alternatively in the event that said Motion is denied, to stay processing of said Stipulation until a decision has been rendered by the Court of Appeals in the above matter, and in either case to also permit the filing of a further statement in support of objections, 30 days after the decision of the Court.

This Motion is based upon the following sound and substantial considerations:

1. Even though Section 101.9(c)(2) of the Board's Statements of Procedure provides that the General Counsel, after approval of a proposed formal settlement agreement, shall submit it to the Board, the Board has the discretion, especially under the compelling circumstances present here, to stay such submission and withhold its acceptance of the transfer of the agreement. In its present posture, the Board here cannot properly review the Stipulation. The Complaint in Case Nos. 20462 and 20472 alleged that the General Counsel, acting in his prosecutorial capacity as defined in Section 3(d) of the National Labor Relations Act, unlawfully denied the Charging Party participatory rights in the negotiations leading to the Settlement Stipulation. The General Counsel's action constituted a final determination; neither the Board nor a Circuit Court under Section 10(e) and (f) of the Act may review prosecutorial decisions of the General Counsel. See *Frito Co.* v. *N. L. R. B.*, 330 F. 2d 458 (9th Cir., 1964). Accordingly, pending the Court's determination as to the propriety of the actions of the General Counsel, the Stipulation should remain within the jurisdiction of the General Counsel.

2. A decision by the Court that the Charging Party is entitled to participate in settlement negotiations would necessarily require that any approved settlement stipulation be set aside and that negotiations, with the participation of the Charging Party, be reinstituted. Thus, the Board's acceptance of this Settlement Stipulation prior to

the decision of the Court in *Sears* would be, at best, an empty exercise of jurisdiction; any action taken by the Board prior to the decision would be premature and abortive.

3. The General Counsel denied the Charging Party's request to defer submission of the Stipulation to the Board on the basis "of the favorable decision . . . received from the District Court," in Case No. 70 C 356(1). Although the General Counsel thus implies that the position of the Charging Party is meretricious and not deserving of consideration, the very opposite is true. Indeed, the position of the General Counsel was specifically rejected by the Eighth Circuit. That Court flatly denied the General Counsel's Motion for Summary Affirmance of the "favorable decision" of the District Court, thereby destroying the very basis of the General Counsel's decision not to defer submission of the Stipulation.

4. The question of the right of the Charging Party to participate in settlement negotiations, at issue in Case Nos. 20462 and 20472, is one of widespread significance.[1] For example, it is estimated that ninety per cent of charges found meritorious are settled. Thus, the settlement processes are the means by which, for the most part, the National Labor Relations Act is administrated, public rights vindicated and the private rights of respondents and charging parties determined. To illustrate the effect of a decision by the Court concerning the rights of parties to settlements, we have attached an analysis (Exhibits A and B) of all settlement agreements involving Section 8(b)(4) of the Act where objections were filed in the last three

1. The significance of the issues involved in this matter are well illustrated by the enclosed Appellant's Brief in Opposition to Motion for Summary Affirmance, which we commend to the attention of the Board for a full review of the issues involved in Case Nos. 20462 and 20472.

fiscal years. That analysis demonstrates that questions concerning the rights of charging parties with respect to settlement agreements are not isolated, but arise time and time again. In view of this overriding significance of the issues raised in this matter, it would be in the best interests of the Board, as well as of all parties involved, to stay transfer of the Stipulation until the Court has had an opportunity to render its decision. Precipitous action taken now, outside the context of a relevant judicial determination, can only impede and confound the ultimate resolution of this matter; it should be avoided at all costs.

5. As corporate citizens, vitally interested and vitally affected by the administration of the National Labor Relations Act, we welcome an opportunity, in accordance with the suggestion of the Board's Liaison Committee, to make constructive suggestions concerning the administration of the Act. One significant area of national concern is the ineffectiveness of Board settlement agreements, particularly in the 8(b)(4) area. Sears, Roebuck and Co., and Terminal Freight Cooperative Association, which consists of 39 companies operating out of 39 freight terminals, have had considerable experience with secondary boycott situations. That experience can best be presented to the Board in the context of what we hope will be an elucidating court decision on the rights of charging parties in the settlement area.

6. We wish to call to the attention of the Board the decision of the United States Court of Appeals for the Fifth Circuit in *Concrete Materials of Georgia, Inc.* v. *N. L. R. B.* (March 17, 1971), No. 29559, wherein the Court said that:

> Under this analysis, it is clear that the charging party has the right to contest any proposed settlement between the Regional Director and the charged party both by objecting to it before the Board and by petitioning for review if the Board enters an order over

his objection based upon the agreement. To insure that the charging party's objections are considered by the Board, we feel that the charging party must be afforded (1) an evidentiary hearing on any material issues of disputed fact presented by his objections, see *N. L. R. B.* v. *Brush-Moore Newspapers, Inc.*, 6 Cir., 1969, 413 F. 2d 809, 811, cert. den. 396 U. S. 1002; and (2) a presentation on the record of reasons for acceptance of the settlement agreement as the basis for the order notwithstanding his objection.

To date the Charging Party has no knowledge of the extent of the material issues involved in the settlement agreement, as it was not a party to the settlement negotiations or given certain information it requested. Therefore, at this juncture, the Charging Party is not even in a position to request an evidentiary hearing, as required by *Concrete Materials;* and must await the decision of the Court of Appeals for the Eighth Circuit to be fully advised of its rights with respect to the settlement agreement.

7. Because of the complexity of the issues here involved, in the event that the Court in Case Nos. 20462 and 20472 rejects our contentions, we request a reasonable period of thirty days to file, pursuant to Section 101.9(c)(2), a further statement in support of our objections to the Stipulation. We base this request on the following compelling considerations:

(a) The documents to be submitted and the exhibits to be attached constitute a more voluminous record than is found in most litigated cases. In addition, we must have the opportunity to evaluate fully our position, in light of the Court's decision.

(b) While normally, delay might be unwise or injurious to a party, in the posture of this case, no party—certainly neither the Union nor the Board will in any way be harmed by further delay. As a matter

of fact, any delay encountered thus far in the litigation of this case in Court cannot be attributed to the efforts of Charging Party, but to those of the General Counsel. For example, in Case Nos. 20462 and 20472, the General Counsel took more than 70 days to file its brief in the Court of Appeals. The Charging Party submitted its reply brief in 6 days and consolidated its opposition to the Motion for Summary Affirmance and its brief on the merits in one document so as not to lengthen the briefing schedule. It also requested the Court to grant an expedited briefing schedule in order not to delay this matter any further.

(c) This case presents an excellent vehicle for the Board to use to review its settlement procedures in the hope of achieving more effective settlement agreements. As we can estimate, in view of the fact that the Eighth Circuit normally issues opinions within two or three months after oral argument, the Court's decision will come down within six weeks, a minor and unprejudicial delay at this point may result in a significant opportunity by the Board to engage in full and constructive settlement procedures.

WHEREFORE, it is hereby requested that the Board stay submission and withhold acceptance of the Stipulation of Formal Settlement referred to it by the General Counsel on March 19, 1971, pending the decision of the Court of Appeals for the Eighth Circuit in *Sears, Roebuck and Co.* v. *Solien* (Nos. 20462 and 20472), or, alternatively in the event that said Motion is denied, stay processing of said

Stipulation until a decision has been rendered by the Court of Appeals in the above matter.

Respectfully submitted

GERALD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE M. COHEN,
HERBERT M. BERMAN
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602
Attorneys for Sears, Roebuck and Co.

JERRY KRONENBERG
BOROVSKY, EHRLICH & KRONENBERG
120 So. LaSalle St.
Chicago, Illinois 60603
Attorneys for Terminal Freight Cooperative Association and Terminal Freight Handling Company.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MISCELLANEOUS DRIVERS AND HELPERS UNION LOCAL No. 610, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (Be-Rite Delivery Service, Inc.) and SEARS, ROEBUCK AND CO.	Case No. 14-CC-603
MISCELLANEOUS DRIVERS AND HELPERS LOCAL No. 610, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING COMPANY AND MAY DEPARTMENT STORES, INC.	Case No. 14-CC-604

MOTION TO TOLL TIME TO FILE FURTHER STATEMENT IN SUPPORT OF OBJECTIONS TO SETTLEMENT STIPULATION.

Pending the decision of the Board on the Charging Party's Motion to Stay Submission of Settlement Agreement or, Alternatively, to Stay Processing of Settlement Agreement, the Charging Party requests that the Board toll the time to file a Further Statement in Support of

Objections to Settlement Stipulation and further requests that the Board grant it 30 days from the date said Motion to Stay Submission is determined, to submit its Further Statement in Support of Objections to the Settlement Stipulation.

No party will be harmed by the granting of the extension, and the extension is required because of the voluminous nature of the documents and exhibits to be analyzed, the critical importance of this matter—to the public as well as to the parties involved—and the necessity for a full and detailed exposition of all the issues.

Respectfully submitted,

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

JERRY KRONENBERG
BOROVSKY, EHRLICH &
KRONENBERG
120 So. LaSalle St.
Chicago, Illinois 60603
Attorneys for Terminal Freight Cooperative Association and Terminal Freight Handling Company

LAWRENCE M. COHEN
HERBERT M. BERMAN
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602
Attorneys for Sears, Roebuck and Co.

LEDERER, FOX AND GROVE
Attorneys at Law
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

April 6, 1971

Mr. George Leet
Associate Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570

Re: Miscellaneous Drivers and Helpers Union,
Local 610—Case Nos. 14-CC-603 and 604

Dear George:

This will confirm our telephone conversation of last week with respect to our Motions of March 26, 1971 requesting a tolling of the time for filing, pursuant to Section 101.9(c)(2) of the Board's Rules, a further statement with the Board of the charging parties' objections to the proposed settlement agreement in the captioned cases.

You advised me that the time for filing such a statement would be extended until the Eighth Circuit issues its decision in *Sears, Roebuck and Co.* v. *Solien* (Nos. 20462 and 20472). At the time that decision issues, I will so advise you and, if the Court has ruled against the Plaintiffs, a reasonable time will then be provided charging parties for the submission of any further statement.

If this is not in accord with the position of the Board, will you please let me know immediately.

Very truly yours,

LAWRENCE M. COHEN
for LEDERER, FOX AND GROVE
Attorneys for Sears, Roebuck and Co.

LMC:FW

STATUTE INVOLVED.

NATIONAL LABOR RELATIONS ACT.

(61 Stat. 136, 29 U. S. C. Sect. 151, et seq.)

Sec. 10(e), 29 U. S. C. § 160(e):

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court

may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Sec. 10(f), 29 U. S. C. § 160(f):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such

temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Sec. 10(g), 29 U. S. C. § 160(g):

The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

Sec. 10(h), 29 U. S. C. § 160(h):

"When granting temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

Sec. 10(j), 29 U. S. C. § 160(j):

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have

jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Sec. 10(k), 29 U. S. C. § 160(k):

Whenever it is charged that any person has engaged in an unfair-labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directerd to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Sec. 10(l), 29 U. S. C. § 160(l):

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary

restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)."

LIBRARY
SUPREME COURT, U. S.

FILED
MAY 5 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1588

SEARS ROEBUCK AND CO.,
and
TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO., *Petitioners*,
v.
JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,
and
MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MILTON A. SMITH,
General Counsel,

ANTHONY J. OBADAL,
Labor Relations Counsel,
Chamber of Commerce of the United States of America,
1615 H Street, N.W.,
Washington, D. C.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Interest of Amicus Curiae	1
Reasons for Granting the Writ	3
A. The Present Case Raises Significant Issues Regarding the Administration of the Act Which Should Be Resolved by This Court in the Exercise of Its "General Power To Supervise the Administration of Justice in the Federal Courts." Western Pacific R. Corp. v. Western Pacific R. Co., 345 U.S. 247, 260	3
B. The Decision of the Court Below Hinders the Public Interest by Suppressing Evidence and Argument Before the Courts in 10(l) Proceedings	6
C. The Decision of the Court Below Departs from the Better-Reasoned Precedent	7
Conclusion	9

TABLE OF AUTHORITIES

CASES:

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150	5
Barlow v. Collins, 397 U.S. 159	5
Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235	8
Carpet Layers, Local 419 v. NLRB, — F. 2d —, 74 LRRM 2444 (D.C. Cir. 1970)	4
Retail Clerk's Union, Local 137, et al. v. Food Employers Council, Inc., 351 F. 2d 525 (9th Cir. 1965)	6
Sears, Roebuck and Co. v. Local 419, Carpet Layers, 397 U.S. 655	2
The Los Angeles Herald-Examiner, et al. v. Kennedy, Docket No. 350	2
United Automobile Workers v. Scofield, 382 U.S. 205	5, 6, 7
Western Pacific R. Corp. v. Western Pacific R. Co., 345 U.S. 247	3, 6

Page

STATUTES:

Judicial Review Act, 5 U.S.C. § 1038 5

OTHER AUTHORITIES:

II Legislative History of the Labor-Management Reporting Act of 1959 (1959) 3

Senate Report No. 105, 80th Cong., 1st Sess. (1947) ... 3

Thirty-third Annual Report of the National Labor Relations Board (1968) 3

Thirty-fourth Annual Report of the National Labor Relations Board (1969) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1588

SEARS ROEBUCK AND CO.,
and
TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO., *Petitioners,*
v.
JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,
and
MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and

* This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(1).

trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000. It is the largest association of business and professional organizations in the United States.

The National Chamber has previously submitted its views with respect to the issue involved in this case, the rights of charging parties to participate in an injunction proceeding under Section 10(l) of the National Labor Relations Act, in its *amicus* brief in support of the petition for writ of certiorari before judgment and in *The Los Angeles Herald-Examiner, et al.* v. *Kennedy,* No. 350, this term. The subsequent grant of the petition for writ of certiorari in *Los Angeles Herald-Examiner,* coupled with the acceptance of a similar petition last term in *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers,* 397 U.S. 655, indicates this Court's awareness of the importance of defining the status of a charging party in a 10(l) case.

The problem here presented is thus a substantial and recurring one,[1] and one which has to date escaped review by this Court by reason of a technical application of the mootness doctrine. See Petition, pp. 11-12. The National Chamber believes that the instant case now presents an appropriate vehicle for this Court to provide the necessary guidance. If a large na-

---

[1] Of the total unfair labor practice charges filed against unions under Section 8(b) of the Act during NLRB fiscal year 1969, *32 per cent,* or over 2100 charges, involved alleged violations of Section 8(b)(4). This represents a 13% increase over the 8(b)(4) charges filed in fiscal year 1968. *Thirty-fourth Annual Report of the National Labor Relations Board,* p. 13 (1969).

tional enterprise such as Sears, Roebuck and Co., exercising all possible diligence and expedition, is repeatedly frustrated in its attempt to obtain review by this Court, there is surely little hope for the countless thousands of similarly-situated small employers throughout the nation who cannot pursue as actively such litigation.[2] This case has not yet been rendered moot, and the critical issue involved remains a viable one raised in an appropriate posture for review by this Court.

REASONS FOR GRANTING THE WRIT

A. The Present Case Raises Significant Issues Regarding the Administration of the Act Which Should Be Resolved by This Court in the Exercise of Its "General Power To Supervise the Administration of Justice in the Federal Courts." Western Pacific R. Corp. v. Western Pacific R. Co., 345 U.S. 247, 260.

Congress has recognized that the secondary boycott is a vicious and devastating economic weapon;[3] it is destructive to the free flow of commerce and places the neutral employer in grave jeopardy of losing all or part of his established business. Accordingly, Congress not only outlawed such conduct, but provided an immediate remedy for the protection of the victimized employer by the enactment of Section 10(l) of the National Labor Relations Act, 29 U.S.C. § 169(e). This provision particularly reflects the sense of grave

---

[2] Over 50% of all charges involving Section 10(l) in 1969 were filed by small employers with less than 30 employees. *Thirty-third Annual Report of the National Labor Relations Board,* Table 18, pp. 238-9, *supra.*

[3] See, e.g., II *Legislative History of the Labor-Management Reporting Act of 1959,* pp. 989, 1376, 1425, 1446, 1842 (1959); Senate Report No. 105, 80th Cong., 1st Sess. (1947).

congressional concern that such conduct be terminated. Unlike other provisions of the federal laws, this section:

1. Commands the Board to give the investigation of such charges immediate priority over all other charges, and

2. Orders the Board, without exception or allowance for discretion, to petition a federal district court for temporary injunctive relief pending final adjudication upon a showing of reasonable cause to support the merits of the charge.

Indeed, the protection afforded by temporary injunctive proceedings under Section 10(l) constitutes the *only* effective bulwark available to employers subjected to unlawful union recognitional picketing, improper "hot-cargo" agreements and illegal secondary boycotts.[4]

---

[4] The protection afforded by a permanent injunction to an employer unlawfully picketed is more illusory than real. The length of time required for the Board to investigate the employer's charge and to issue a complaint, for the Board Trial Examiner and the Board itself to then rule on the complaint and, subsequently, for a court of appeals to enforce any resultant Board order, largely negates the value to the picketed employer of such a proceeding. In *Sears, supra*, for example, the union commenced its picketing on August 7, 1968; the case is still pending before the Board on remand from the District of Columbia Court of Appeals for additional findings. *Carpet Layers 419* v. *N.L.R.B. (Sears, Roebuck & Co.)*, 429 F.2d 747 (D.C. Cir. 1970). Thus far, nearly three years have elapsed with the legality of the underlying dispute still unresolved. Few employers could withstand unlawful picketing of such a duration. Nor can it be said that the delay involved in the *Sears* case presents the unusual situation. See footnote 8 at page 10 of the Petition for Rehearing in *Sears, supra*.

In the face of such a clear congressional purpose, any erosion of the effectiveness of the Section 10(l) remedy cannot be sanctioned. Yet this will be the result of the failure to accord charging parties the status of full "parties", or to permit their right of intervention, in Section 10(l) proceedings. This Court has acknowledged the necessity for conferring such status upon charging parties in proceedings under other provisions of the Act. See, e.g., *United Automobile Workers* v. *Scofield,* 382 U.S. 205. A similar role, as Petitioners suggest, is also contemplated by the Judicial Review Act, 5 U.S.C. § 1038.[5] And a recognition that important private rights, not merely generalized "public rights", are at stake is particularly critical in a 10(l) proceeding where, once the government has instituted suit, the interest of the neutral employer—the strong self-interest of preserving his business—assures the most vigorous pursuit of the injunctive remedy to halt the unlawful picketing.

This Court has determined that "both the successful charged party (in *Scofield*) and the successful charging party (in *Fafnir*) have a right to intervene in a Court of Appeals proceeding which reviews or enforces Labor Board orders." *United Auto Workers* v. *Scofield,* 382 U.S. at 208. This Court has not, however, determined the corollary and equally important extent to which charging parties may participate in proceedings instituted by the Board for temporary injunctive relief or may participate in subsequent appellate review in such proceedings. Accordingly, numerous and

---

[5] See also this Court's recent sensitivity to the rights of private parties in administrative proceedings generally, as expressed in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150 and *Barlow* v. *Collins,* 397 U.S. 159.

divergent rulings have emerged from the courts of appeal concerning this and related questions.[6] Such conflicts, involving significant issues in the administration of the Act, should be resolved by this Court in the exercise of its "general power to supervise the administration of justice in the Federal Courts." *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 260.

B. The Decision of the Court Below Hinders the Public Interest by Suppressing Evidence and Argument Before the Courts in 10(l) Proceedings.

If the decision of the court below is allowed to stand, one of the essential objectives of the Act will be frustrated to the detriment of the public interest. Congress entrusted the keys of the closely-guarded labor injunction to the federal district courts in much the same fashion that enforcement of Board orders was reposed in the courts of appeal. That grant of judicial authority was predicated upon the explicit premise that all parties would have unrestricted opportunity to inform the court, by evidence and argument, of all relevant considerations in a given case. This division of responsibility was acknowledged by the Board and expressly recognized by the Court in *Scofield* where it was stated:

> "In fact, the Labor Board itself agrees that intervention by charged parties will not impair

[6] To give one example: in contrast to the ruling of the Court of Appeals here, the Ninth Circuit has affirmed the issuance of an injunction under Section 10(l) at the urging of the charging party and over the objection of the Board where the charging party "merely supported the original petition for injunctive relief requested by the Regional Director". *Retail Clerk's Union, Local 137, et al.* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (9th Cir. 1965).

> effective discharge of its duties and may well promote the public interest . . . Participation in defining the issues before the court guarantees that all relevant material is brought to its attention, and makes the briefs on the merits more meaningful."

There can be no logical reason for applying the *Scofield* doctrine to one stage of an unfair labor practice proceeding but refusing, as did the court below, to apply it to closely-related injunction sections. If anything, the more logical postulate is that Congress wanted the fullest possible exposure of facts and arguments in light of the limited time available to the court for consideration of its ruling in a 10(l) proceeding and the overriding concern of Congress regarding the need for relief for such violations. Thus, the decision of the Eighth Circuit denying the charging party either the status of a "party" or the right of intervention is clearly contrary to the public interest facet of the statutory scheme and, accordingly, review by this Court is fully warranted.

C. The Decision of the Court Below Departs from the Better-Reasoned Precedent.

The decision of the Ninth Circuit Court of Appeals in *Retail Clerk's Union, Local 137, et al.* v. *Food Employers Council, Inc.,* 351 F.2d 525 (9th Cir. 1965), fully and logically supports the position of the Petitioners here. In that decision, the court reasoned that, since the charging party was only attempting to "support the position of the Regional Director" and was not seeking to "initiate the litigation," the Norris-LaGuarda Act presented no obstacle. Here also, Petitioners are merely seeking to support the position of

the Regional Director who has initiated the appeal and the Norris-LaGuardia Act should not be read as obstructing such participation.

Review is warranted here for the additional reason that, as this Court held last term in *Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770,* 398 U.S. 235, the earlier enacted provisions of the Norris-LaGuardia Act must be accommodated to the subsequent amendments to the National Labor Relations Act. In enacting Section 10(l), Congress expressed a clear purpose of protecting the neutral employer from the disruptive effects of unlawful union picketing. The participatory rights granted neutral employers by the explicit terms of Section 10(l) reflects the judgment of Congress that the prosecutorial efforts of the Board's General Counsel alone would not guarantee such protection. As in *Boys Markets,* the earlier enacted provisions of the Norris-LaGuardia Act cannot be interpreted here as contravening this clear congressional objection by stifling the neutral employer's right to participate at all stages of 10(l) injunctive proceedings. Rather, as the Court said in *Boys Markets,* it is "the task of the courts to accommodate, to reconcile the older statutes with the more recent ones." The court below failed to reach such an accommodation, and, accordingly, review by this Court is now necessary.

CONCLUSION

For the foregoing reasons, as well as for those urged by the Petitioner, the National Chamber urges this Court to grant the petition for a Writ of Certiorari.

Respectfully submitted,

MILTON A. SMITH,
General Counsel,

ANTHONY J. OBADAL,
Labor Relations Counsel
Chamber of Commerce of the
United States of America,
1615 H Street, N. W.,
Washington, D. C.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAY 19 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1598

SEARS, ROEBUCK AND CO.
and
TERMINAL FREIGHT COOPERATIVE ASSOCIATION and
TERMINAL FREIGHT HANDLING CO.,
Petitioners,
vs.
JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on Behalf of the National Labor Relations Board
and
MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF

In Opposition of Respondent Union

HARRY H. CRAIG
NORMAN W. ARMBRUSTER
7 North Seventh Street
St. Louis, Missouri 63101
Attorneys for Respondent, Miscellaneous Drivers and Helpers Union, Local No. 610

Of Counsel
WILEY, CRAIG, ARMBRUSTER & WILBURN
7 North Seventh Street
St. Louis, Missouri 63101

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477



INDEX

	Page
Opinions below	1
Jurisdiction	1
Counterstatement of questions presented	2
Statutes involved	2
Counterstatement of the case	2
Argument	5
A. Section 10(l) clearly limits the rights of a charging party to the right to "appear by counsel and present any relevant testimony"	5
B. The limited role which Congress has assigned charging parties in 10(l) litigation precludes not only their being assigned "full party" status but also denies them the right to intervene	7
Conclusion	11
Addendum	A-1

Cases Cited

Amalgamated Ass'n of Street & Motor Coach Employees v. Dixie Motor Coach Corp., 170 F. 2d 902 (8th Cir. 1948)	10
Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940)	8
Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970)	7

Barlow v. Collins, 397 U.S. 159 (1970) 7

Henderson v. International Union Operating Engineers, Local 701, 420 F. 2d 806 8

Local 438 Laborers v. Curry, 371 U. S. 542 (1963).... 10

Retail Clerks Union, Local 137 v. Food Employers Council, Inc., 351 F. 2d 525 (9th Cir. 1965..... 8

Sears Roebuck & Co. v. Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419 et al., 410 F. 2d 1148 (10th Cir. 1969)..... 6

UAW Local 238 v. Scofield, 382 U.S. 205 (1965)..... 7, 8

Statutes and Rules Cited

5 U.S.C., Sec. 701 et seq. 7

29 U.S.C., Sec. 151 et seq. 2, 3, 5, 8, 9, 10

Federal Rules of Civil Procedure, Rules 62(c) and 65(c) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1588

SEARS, ROEBUCK AND CO.
and
TERMINAL FREIGHT COOPERATIVE ASSOCIATION and
TERMINAL FREIGHT HANDLING CO.,
Petitioners,

vs.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on Behalf of the National Labor Relations Board
and
MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF

In Opposition of Respondent Union

OPINIONS BELOW

The citations to the Opinions Below are adequately set forth in the Petition for a Writ of Certiorari.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition for Certiorari.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

(1) Whether charging parties before the National Labor Relations Board possess the status of "parties" in district court proceedings initiated by the filing by a Regional Director of a petition for an injunction under Section 10 (l) of the National Labor Relations Act.

(2) Whether such charging parties have a right to intervene as a matter of right in such proceedings.

STATUTES INVOLVED

Petitioners have adequately set forth the Statutes Involved in the Petition for Certiorari.

COUNTERSTATEMENT OF THE CASE

Because a very large proportion of the matters contained in the Statement of the Case contained in the Petition is argumentative or irrelevant to the issues here involved, this Respondent makes this Counterstatement of the Case:

Between June 10 and June 23, 1970, Petitioners filed unfair labor practice charges (and amended charges) against Respondent Miscellaneous Drivers and Helpers Union Local No. 610 (hereafter called "Local 610"), alleging that that union had violated Section 8 (b)(4)(B) of the National Labor Relations Act (Pet.Ap. 9-14).[1]

In connection with those charges, Respondent Joseph H. Solien, Regional Director, 14th Region of the Board, on June 29, 1970, filed a petition for injunction under

---

[1] "Pet.Ap." references herein are to the Appendix contained in the Petition for Writ of Certiorari. "A" references are to the printed Appendix filed with the Court of Appeals below and the "SA" references are to the printed Supplemental Appendix filed in said Court of Appeals, both of which we assume Petitioners have filed with this Court pursuant to its Rules.

Section 10 (l) of the Act against Local 610, seeking a temporary injunction against certain picketing alleged in said petition to be violative of the Act (Pet.Ap. 1-15). As stated in that petition, at all times material thereto Local 610 had had a dispute with Be-Rite Delivery Service, Inc. (hereafter called "Be-Rite") concerning wages, hours, terms and conditions of Be-Rite's employees (Pet. Ap. 5), and in connection with that dispute said employees struck Be-Rite on June 9, 1970. However, when the 10 (l) petition was filed that dispute had already been settled, and the strike had ended (Pet.Ap. 46). There has been no picketing or strike activity of any kind from and after June 28, 1970, the day before the 10 (l) petition was filed (S.A. 9).

Nevertheless, on July 1, Terminal Freight Cooperative Association and Terminal Freight Handling Co. (hereafter jointly referred to as "Terminal") filed with the U. S. District Court for the Eastern District of Missouri a motion to appear in said 10 (l) proceedings as a full party litigant, and on July 2, Sears, Roebuck and Co. (hereafter called "Sears") filed a motion that that Court accept its entry of appearance or, in the alternative, to intervene (Pet.Ap. 18-22). On July 6, Local 610 entered its appearance in said cause, and filed a brief in opposition to said motions of Sears and Terminal (A. v-vi).

On July 7, a hearing was held before the District Court, at which all parties were afforded a full opportunity to present their respective positions with respect to said motions of Sears and Terminal. At the same time, all parties were afforded a full opportunity to present their respective positions with respect to a Stipulation that had been entered into between the Regional Director and Local 610, subject to the approval of the Court, to dispose of said 10 (l) litigation (S.A. 1-15). In addition, on the same day Sears and Terminal each filed written objections to the proposed Settlement (A. 57-63). At

that hearing, it was conceded that all picketing had ceased (S.A. 15).

The following day, July 8, the District Court entered his order denying the motions of Sears and Terminal to intervene as full parties in said litigation, but permitting them to appear at all hearings, introduce evidence and file Briefs. In that same order, the District Court disapproved the proposed Stipulation (A. 50-3), which had been signed by the Regional Director and Local 610 (Pet. Ap. 33-34). No further hearings were held by the District Court, but after the Regional Director and Local 610 had made some changes in the original Stipulation language to meet most of the objections which had been raised by Sears and Terminal, the District Court entered an order approving the revised Stipulation as presented to him, copies of both the Order and the Stipulation as revised being mailed to attorneys for Sears and Terminal (Pet.Ap. 33-38; A. vi, vii). The approved Stipulation generally provided that Local 610 agreed not to engage in certain picketing for purposes proscribed by the Act; that if the Regional Director should later file an affidavit that he found probable cause to believe that Local 610 had breached said Stipulation, the District Court may forthwith[2] issue a temporary injunction in the form attached to the Stipulation.

Thereafter, Petitioners here perfected their appeal to the Court of Appeals for the Eighth Circuit. On March 12, 1971, that Court affirmed the judgment of the District Court denying appellants full party status and the right to intervene (Pet.Ap. 43-58).

---

[2] The Stipulation which the District Court rejected had provided for a 24-hour notice before the temporary injunction could be issued (A. 52). In addition, paragraph 5 of the rejected Stipulation, to which Sears and Terminal had objected at the July 7th hearing (S.A. 3-5) was stricken from the Stipulation as approved by the District Court.

ARGUMENT

A. Section 10 (l) Clearly Limits the Rights of a Charging Party to the Right to "Appear by Counsel and Present Any Relevant Testimony".

Petitioners contend that the legislative history of the Taft-Hartley amendments to the National Labor Relations Act show a Congressional "intent" to permit charging parties to have full party status in 10 (l) injunctive proceedings. However, they choose to ignore the fact, as set out in the opinion of the Court of Appeals for the Eighth Circuit below (Pet.Ap. 49), that in enacting Section 10 (l)[3] Congress drew a clear distinction between the status to be afforded a labor organization against whom injunctive relief is sought by the Regional Director, and that of the charging party in the underlying unfair labor practice case. As to the labor organization in such a case, the Eighth Circuit points out that Section 10(l) provides that the service of legal process upon certain officers and agents thereof "shall constitute service upon the labor organization and make such organization a **party to the suit**" (emphasis supplied). As to "any person involved in the charge", including the "charging party", Section 10 (l) limits their participation to receiving from the Court notice of "filing of any such petition" and to be "given an opportunity to appear by counsel and present any relevant testimony" (Pet.Ap. 49).

There is a sound reason why Congress did not afford party status to Charging Parties in 10 (l) litigation. The 10 (l) provisions are an exception to the Norris-LaGuardia prohibition against injunctions in labor disputes, as 10 (h)[4] of the Act sets out. Having made such an ex-

---

[3] Reprinted in pertinent part as an Addendum to this Brief.

[4] Reprinted in pertinent part as an addendum to this Brief.

ception, Congress was careful to provide that such injunctions could only be applied for by a Regional Director or Regional Attorney. Congress was aware of the excesses which had been committed by Federal Courts in granting injunctions in labor disputes on petition of employers, which ultimately led to the enactment of the Norris-LaGuardia Act. In **Sears Roebuck & Co. v. Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419 et al.**, 410 F. 2d 1148, 1150 (10th Cir., 1969), that Court, after pointing out that in enacting the Norris-LaGuardia Act Congress was "intent upon taking the Federal Courts out of the labor injunction business", stated:

> "Accordingly, when an exception to that Act, such as is here involved, is relied upon to support the jurisdiction of the Court, the language employed to articulate that exception will not be given any more expansive an interpretation than is clearly warranted. Viewed in that context, the limited rights conferred upon a Charging Party in a 10 (l) proceeding, the right to 'appear by counsel and present any relevant testimony,' must be taken to mean just that, no more and no less."

Petitioners' argument that legislative history establishes that Congress intended that a charging party be given full party status seems to be that since Congress had considered giving private parties the right to seek injunctive relief, though such provisions were stricken from the legislation as finally passed, that indicates an intent of Congress to give a charging party full party status. The logic of such an argument escapes this Respondent.

The Eighth Circuit has correctly advised Petitioners that their reasons for contending that charging parties should be given full party status "should be addressed to Congress, the policy making branch of the government" (Pet.Ap. 52).

B. **The Limited Role Which Congress Has Assigned Charging Parties in 10 (l) Litigation Precludes Not Only Their Being Assigned "Full Party" Status But Also Denies Them the Right to Intervene.**

As an alternative to their argument that they are entitled to "full party" status, petitioners contend they at least have the right to intervene in 10 (l) proceedings. The thrust of their initial argument on that issue seems to be that this Court in **Association of Data Processing Service Organizations, Inc. v. Camp**, 397 U.S. 150 (1970) and **Barlow v. Collins**, 397 U.S. 159 (1970) announced certain criteria which one must meet in order to establish that he is sufficiently aggrieved by an administrative order to be entitled to judicial review under the Administrative Procedure Act, 5 U.S.C., Sec. 701 et seq., of an adverse agency action—and that petitioners here have met that test. As the Eighth Circuit pointed out in its opinion, we are here concerned with the issue of whether charging parties have the right to obtain appellate review from a **judicial** order in 10 (l) proceedings and not the right of judicial review of **administrative** action. Moreover, neither **Data Processing** nor **Barlow** involved the National Labor Relations Act. **Data Processing** dealt with the Bank Service Corporation Act and the National Bank Act, while **Barlow** was concerned with an interpretation of the Food & Agriculture Act. This Court, in **UAW Local 238 v. Scofield**, 382 U.S. 205, 210 (1965), in holding that a charging party did have the right to intervene in a Court of Appeals' review of National Labor Board final orders, stated:

> "Of course, in considering the propriety of intervention in the courts of appeal, our discussion is limited to Labor Board review proceedings. Federal agencies are not fungibles for intervention purposes—Congress has treated the matter with attention to the particular statutory scheme and agency."

It is **Scofield** upon which petitioners chiefly rely to support their claim to the right to intervene in 10 (l) proceedings. **Scofield,** of course, dealt with appellate court review of final NLRB administrative orders as provided for in Section 10 (f) of the Act and intervention was permitted charging parties principally to avoid "unnecessary duplication of proceedings" (382 U.S. at 212). It is to be noted that while affording charging parties the right to intervene in such appellate review proceedings of final Board orders, this Court has denied charging parties the right to institute contempt action against the charged party in the Court which enforces the Board order. **Amalgamated Utility Workers v. Consolidated Edison Co.,** 309 U.S. 261 (1940).

Petitioners argue in their Petition that **Retail Clerks Union, Local 137 v. Food Employers Council, Inc.,** 351 F. 2d 525 (9th Cir. 1965) supports their right to intervene. As the Eighth Circuit points out (Pet.Ap. 55), all that **Retail Clerks** holds is that a District Court has the power to grant a 10 (l) injunction originally petitioned for by the Regional Director, notwithstanding the fact that the latter had meanwhile entered into a stipulation with the Respondent union which he felt obviated the need for that relief; that the Ninth Circuit had emphasized that its holding was concerned only with the respective roles to be played by the Regional Director and the district court, and that it was not defining "the limits of the scope of participation to be permitted the charging parties" (351 F. 2d at 529, n. 2). The Ninth Circuit itself, in denying intervention to the Charging party in **Henderson v. International Union Operating Engineers, Local 701** (420 F. 2d at 806, n. 2) distinguished **Retail Clerks** from the issue it had before it—the right of a charging party to intervene. In its opinion below, the Eighth Circuit has pointed out that "no court that has considered the question of the charging party's independent standing to seek appellate

review of an adverse 10 (l) decision has accorded the charging party this right (Pet.Ap. 56). Petitioners, on page 11 of their Petition, cite "**Solien v. International Printing Pressmen et al.**, ... F. 2d ..., 76 LRRM 1094 (CA 7, 1970)" as a case in which a charging party was afforded the right to intervene in 10 (l) proceedings. The reference "76 LRRM 1094" is to the underlying NLRB case and has nothing to do with 10 (l) litigation. Respondent Union's counsel has searched for any published report of any Seventh Circuit order involving 10 (l) litigation involving "Printing Pressmen" and has found none. In any event, it appears from Petitioners' description of such litigation, that the issue of whether a charging party has the right to intervene in 10 (l) proceedings was never actually litigated.

Petitioners, in reviewing legislative history, state that the Taft-Hartley amendments as finally adopted represented a compromise. That is correct. Local 610 contends, however, that in doing so Congress provided in the Act much more in the way of remedies to those who claim secondary activity than it has given any other person under the Act. First, in Section 303,[5] it has provided that a labor organization may be sued for damages for alleged violation of Section 8(b)(4). The Act provides no private causes of action in Federal Courts for employer unfair labor practices. Secondly, Section 10 (l) makes it mandatory for Regional Directors to seek injunctive relief for alleged violations of 8(b)(4) and for no other type of violation (except 8(e) and 8(b)(7)) even where the most flagrant employer unfair labor practices are involved.[6]

---

[5] Reprinted in pertinent part as an addendum to this Brief.

[6] As a result, although four times as many complaints are filed by the National Labor Relations Board against employers than against unions, seven times as many injunctions are issued against labor unions than against employers. 36th Annual Report of National Labor Relations Board, Tables 8 and 20.

Thirdly, a complaining employer can obtain the benefits of a 10 (l) injunction, with the Government carrying the expense of such litigation, and without either the employer or the Regional Director being required to post bond as is required under Rules 62 (c) and 65 (c) of the Federal Rules of Civil Procedure in the normal injunction proceedings. Accordingly, if the Federal Court issues an injunction against certain picketing and is later found to be in error, the labor union has no relief, though the United States Supreme Court has recognized that "the issuance of a temporary injunction * * * may effectively dispose of (the union's) rights . . ." **Local 438 Laborers v. Curry**, 371 U. S. 542, 550 (1963). In spite of all of these advantages given employers under the Act in alleged secondary boycott situations, Sears and Terminal want more —the right to control 10 (l) litigation and thus to obtain directly, what they could not obtain indirectly, since it has been well established that private parties may not sue to enjoin secondary activities. **Amalgamated Ass'n of Street & Motor Coach Employees v. Dixie Motor Coach Corp.**, 170 F. 2d 902 (8th Cir. 1948).

As pointed out at the beginning of our Argument, Petitioners ignore the plain language of the statute which restricts the role which persons "involved" in the charge, including the Charging Party, may play. They attempt to make their case by "analogy". That Charging Parties have the right to participate in Board proceedings as full parties litigant, and in appellate review of those proceedings, as Petitioners argue throughout their Petition, is entirely irrelevant to the question here involved.

This case does not deal with Board proceedings or appeal from those proceedings. It deals with injunctive proceedings in Federal Court, and Petitioners' argument should be addressed to Congress, not this Court.

CONCLUSION

For the foregoing reasons, Respondent Union respectfully submits that this Petition for Certiorari should be denied.

HARRY H. CRAIG

NORMAN W. ARMBRUSTER
7 North Seventh Street
St. Louis, Missouri 63101
Attorneys for Respondent
Miscellaneous Drivers and
Helpers Union Local 610

Of Counsel:

WILEY, CRAIG, ARMBRUSTER
& WILBURN
7 North Seventh Street
St. Louis, Missouri 63101

APPENDIX

ADDENDUM

The pertinent provisions of the National Labor Relations Act, as amended (29 U. S. C., Sec. 151 et seq.) referred to in this brief are as follows:

Sections 10 (h) and (l)—29 U. S. C., Sec. 160 (h), (j) and (l):

"Section 10—Prevention of Unfair Labor Practices:

* * *

(h) When granting appropriate relief or a restraining order * * * as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes; approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

* * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4 (A), (B), or (C) of section 8 (b), or section 8 (e) or section 8 (b) (7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States * * * within any district where the unfair labor practice is questioned has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive

relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: * * *. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: **Provided further,** That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. * * *"

Section 303—29 U. S. C., Sec. 187:

"Section 303. (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8 (b) (4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1588

SEARS, ROEBUCK AND CO., ET AL., PETITIONERS

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR RESPONDENT SOLIEN IN OPPOSITION

1. Petitioners filed charges with the Regional Director of the National Labor Relations Board, alleging that Miscellaneous Drivers and Helpers Union, Local 610 was engaging in a secondary boycott in violation of Section 8(b)(4)(B) (29 U.S.C. 158(b)(4)(B)) of the National Labor Relations Act (Pet. App. A9–14). Respondent Regional Director, upon determining that a complaint should issue on the charges, petitioned the United States District Court for the Eastern District of Missouri for an injunction against the Union's activity, pursuant to Section 10(*l*) (29 U.S.C. 160 (*l*)) of the Act (Pet. App. A1–8).

Before the date set for hearing on the injunction, the Regional Director and the Union entered into a stipulation providing for cessation of the Union's alleged unlawful conduct pending final determination of the charges by the Board (A. 50–56).[1] Petitioners filed objections to the stipulation on the ground that it provided inadequate protection (A. 57–63), and these objections were fully considered by the district court (S.A. 1–15). After modification to meet some of petitioners' objections, the district court approved the stipulation (Pet. App. A35–38). The stipulation provided for automatic entry of a temporary injunction upon the filing of the Regional Director's affidavit that he had probable cause to believe that the terms of the stipulation were being violated (Pet. App. A37).[2]

Shortly after the filing of the injunction petition, petitioners moved to appear as full parties litigant, or to intervene, in the Section 10(*l*) proceeding (Pet. App. A18–22). The district court denied these motions

[1] "A." refers to the appendix, and "S.A." to the supplemental appendix, filed with the briefs in the court below.

[2] Petitioners assert (Pet. 31) that the stipulation only authorizes the Regional Director to seek an *ex parte* restraining order which would expire five days from issuance. However, the stipulation provides that further hearings before the district court are waived and that, upon the filing of the aforementioned affidavit, "the court may forthwith enter a Temporary Injunction * * * in the form set forth in Exhibit (A) attached hereto" (Pet. App. A37). The form injunction set forth in Exhibit (A), which was not reprinted in the appendix to the petition, expressly states that it shall be effective "pending the final disposition of the matters involved pending before the National Labor Relations Board."

(Pet. App. A33–34). Petitioners appealed and then filed a petition for a writ of certiorari before judgment in the court of appeals, which this Court denied. *Sears, Roebuck and Co.* v. *Solien,* No. 781, this Term, certiorari denied, January 11, 1971. The court of appeals subsequently sustained the district court's ruling that the charging party is not entitled to full party status, or to intervene as of right, in a Section 10(*l*) injunction proceeding (Pet. App. A43–58). The present petition seeks review of that decision.

2. The question whether the charging party is entitled to full party status, or to intervene as of right, in a Section 10(*l*) proceeding was before the Court in *Sears Roebuck & Co.* v. *Carpet Layers,* 397 U.S. 655, dismissed on grounds of mootness. Although the issue is a recurrent one in the administration of the Act, this case is not an appropriate one for the Court to consider it.

The secondary activity on which the charges are based has ceased, and the strike against the primary employer which gave rise to that activity also has been terminated (S.A. 15, 16–17, 22). The Union has agreed with the Regional Director to enter into a formal settlement of the unfair labor practice case, and has consented to the entry of an order by both the Board and the court of appeals enjoining it from engaging in the secondary activity alleged in the complaint (A. 81–89). The settlement agreement has been approved by the General Counsel and is pending ap-

proval by the Board.[3] Under these circumstances resolution of the issue in this case would be of no practical consequence, even though the case is not technically moot. Review by this Court is therefore not warranted. See *Terminal Freight Cooperative Assoc.* v. *Samoff*, No. 1481, O.T., 1969, certiorari denied, 398 U.S. 965; cf. *McLeod* v. *General Electric Co.*, 385 U.S. 533.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

MAY 1971.

---

[3] Petitioners brought suit in the district court to enjoin the settlement negotiations, partly on the ground that they had not participated in the negotiations. The district court dismissed the suit for want of jurisdiction (Pet. 8, n. 6). A stay of that decision pending appeal was denied by both the court of appeals and Mr. Justice Blackmun (*Sears, Roebuck and Co.* v. *Solien*, 1970 Term, application denied, August 19, 1970). That case is currently pending before the Eighth Circuit. The Board has stayed its consideration of the settlement stipulation pending decision by the court of appeals.

U.S. GOVERNMENT PRINTING OFFICE: 1971

LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAY 25 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1588

SEARS, ROEBUCK AND CO.,

AND

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO.,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

AND

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

Of Counsel:
ALAN RAYWID,
COLE, ZYLSTRA & RAYWID,
2011 Eye Street, N. W.,
Washington, D. C. 20006,

LAWRENCE M. COHEN,
LEDERER, FOX & GROVE,
111 West Washington Street,
Chicago, Illinois 60602,

D. J. SULLIVAN,
LEWIS, RICE, TUCKER,
ALLEN & CHUBB,
1555 Railway Exch. Bldg.,
611 Olive Street,
St. Louis, Missouri 63101,

GERALD TOCKMAN,
1153 Pierre Laclede Building,
7701 Forsythe Boulevard,
St. Louis, Missouri 63105.

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
Attorney for Petitioner, Sears, Roebuck and Co.

JERRY KRONENBERG,
MURRAY F. BAHM,
BOROVSKY, EHRLICH & KRONENBERG,
120 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Petitioners, Terminal Freight Cooperative Association and Terminal Freight Handling Company.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1588.

SEARS, ROEBUCK AND CO.,

AND

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO.,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

AND

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

A. REPLY TO THE REGIONAL DIRECTOR'S OPPOSITION.

In his memorandum in opposition to the instant petition for writ of certiorari, Respondent Regional Director argues that the petition should be denied because a resolution of the substantive questions presented would be of "no practical consequence" in this case. In essence, this contention reduces to a claim that the case is moot,—although the Director does concede that it "is not technically moot",—since the very facts marshalled and the authorities cited

in support were urged on the court below as establishing such "mootness".

This contention is challenged and requires response.

In the court below, this same contention was urged, supported by the same facts alleged here, in an effort to induce the court to decline resolution of the substantive issues raised. That court, in reliance upon cited decisions of this Court and of various subordinate courts, and upon the considered views of legal scholars, concluded that,—notwithstanding the termination of hostilities and the attempted unilateral settlement by the two Respondents of the underlying dispute:

> "However, we feel *in this case* there are cogent reasons for passing upon the merits of the appeal even should the pending settlement stipulation be so approved. We are impressed with the arguments of appellants that the alleged errors committed in the Section 10(l) proceedings are *inherently evasive of review* since it is not feasible to perfect and obtain an appellate review prior to the Board's 'final adjudication'. . . . the doctrine of mootness should not be used to perpetually frustrate judicial review of *issues of public importance* arising in otherwise justiciable cases, . . .
>
> "We conclude that these appeals are not moot; furthermore the policy of ensuring judicial review of *issues of public importance* which are *inherently evasive of review* compels us not to refuse review on the basis of mootness." (A. 48) (Emphasis added)
>
> "We do not think the case is moot because the *probability of repetition of unlawful secondary boycott activity* by the Union in the instant case is sufficient to satisfy the 'mere possibility' test articulated in *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953)." (A. 47) (Emphasis added)

Under the authorities cited by the court below, being principally decisions of this Court, there is no longer any reasonable dispute that cases are not moot in which the following three tests are satisfied:

1) There is a possibility of recurrence of the charged unlawful conduct;
2) The issues to be decided are of public importance; and
3) Those issues are inherently evasive of review.

Each of these tests discussed *seriatim* below, is satisfied in the instant case and *neither* the Director nor the Union disputes that fact.[1]

First, neither Respondent contends that the unlawful picketing which gave rise to this case cannot recur. Indeed, they are barred from so arguing by decisions of this Court, as, for example, *Local 1976, United Brotherhood of Carpenters and Joiners, et al.* v. *N. L. R. B.*, 357 U. S. 93, a case whose facts in all material aspects mirror those in the instant proceeding. In *Local 1976,* a union had engaged in an unlawful secondary boycott, had ceased such conduct subsequent to the filing of charges against it, and had then settled the underlying dispute which had given

1. In lieu of addressing himself to these tests (other than to concede both the likelihood of recurrence and the fact that the case is not "technically" moot) the Director relies on this Court's decision in *Terminal Freight Cooperative Association, et al.* v. *Samoff,* 398 U. S. 965, in which this Court declined to review a decison of the Third Circuit holding a case to be moot in which a similar issue was raised by charging parties concerning their status under Section 10(l). Apart from the fact that the Third Circuit's conclusion—that the case was moot in view of the cessation of picketing and the execution of a contract—is in direct conflict with the judgment of the court below, it is appropriate to note that the Third Circuit, unlike the court below, rendered its decision wholly without reference to or apparent consideration of the criteria listed above.

In any event, this Court's refusal to review that case is not controlling here in view of the fact that the petition for certiorari filed there sought both a decision from this Court *on the merits before judgment below* as well as a reversal of the court's conclusion of mootness. This was a procedural posture not conducive to review by this Court, an obstacle not present in the instant case. In addition, the regularity with which the substantive issues presented by both cases would continue to arise was not known when the earlier petition was denied; this further distinction, quite apart from other differences between the cases, is sufficient to warrant a different result from this Court here.

rise to its unlawful boycott activity by entering into a collective bargaining agreement. In that case, moreover, the parties went so far in order to eliminate the likelihood of a recurrence of the illegal conduct involved as to incorporate into their agreement an explicit pledge by the union not to resume striking. Nonetheless, this Court held that "the controversy was not rendered moot" under these facts; ". . . we cannot say that there was no danger of continued violation". Beyond the specific and controlling decision in that case, analysis of this Court's opinions relating to the meaning of the requirement that injuries must be capable of recurrence in order to avoid "mootness" reveal a broader construction of the concept; it is sufficient that there exists a possibility that the same alleged injury from the same source will recur to the same or to similar persons. (*E.g., Moore* v. *Ogilvie,* 394 U. S. 814.) Since the injury alleged here is the failure to accord "party" status to charging parties in proceedings under Section 10(l), it is clear that the requisite likelihood of recurrence exists: illegal strikes and boycotts will continue to occur; they will be remedied under the same statute as is involved here; charging parties' participatory role under the statute will be interpreted by the same judges and by others who will rely on the adverse precedent below; and the Board will continue to urge the same adverse result in every such case in which any charging party seeks to participate as a full party-litigant in order to protect his unique and legitimate private interests. Finally, in agreement with this argument, —hence in agreement with the court below, —the Director concedes the point in his Memorandum, at page 3:

> ". . . the issue is a recurrent one in the administration of the Act, . . ."

Second, the issues raised are of public importance. This conclusion, adopted by the court below, was apparently adopted by this Court as well since, within the last two

years, this Court has granted petitions for writs of certiorari in two cases which raised essentially the same issue as is involved here.[2] That importance derives from the fact that a resolution of the proper role of charging parties under Section 10(l) involves a determination of Congressional intent in an area in which Congress took great pains to create broad rights and afford sure relief from what Congress conceived to be the single most harmful type of unfair labor practice banned in the Act. And apart from the significance of achieving an orderly judicial clarification of the law in an area which has spawned so much litigation and "is a recurrent [problem] in the administration of the Act," the issues are of great practical importance to charging parties. At stake, for example, is their right to take prompt and independent action in the district courts, in support of the Board's injunction petition, which the Board, lacking the charging parties' information or personal interest in the outcome, may fail to take.[3] Similarly at stake is the charging parties' right to appeal adverse district court decisions which the Board, often for tactical or budgetary reasons unrelated to the merits of the case, declines to appeal.

---

2. *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers*, 397 U. S. 655; *The Los Angeles Herald Examiner, et al.* v. *Kennedy*, ... U. S. ....., 75 LRRB 2379 (No. 350, Oct. 12, 1970). Although certiorari was granted in each, both cases were adjudged moot without resolution of the substantive questions presented.

3. In the instant case, for example, one of the respects in which the denial of "party" status to the charging parties has resulted in practical injury is that, according to the Board, at least, they are deemed to lack standing under Section 10(l) to bring to the district court's attention a resumption of lawful conduct when the Board elects to permit its pending junction petition to remain inactive on the court's docket. This is a common problem in situations where the Board and the Respondent Union enter into a Stipulation (as they did here) in lieu of securing an injunction; the Board's petition remains inactively on file and not even a resumption of picketing results in the securing of injunctive relief unless and until the Board is disposed to bring the matter to the court's attention and to seek to cause a hearing to be convened.

Accordingly, given the practical impact of these matters, together with the substantial and legitimate interest of the public in the development and clarification of rules and procedures adopted on their behalf, there exists the requisite "public importance" in the resolution of the instant issues to satisfy the second test for overcoming "mootness".[4]

Third, the issues presented are inherently evasive of review. This conclusion, adopted by the court below as an essential element in overcoming claims of mootness or absence of a justiciable issue, derives support from the prior experience of charging parties who sought to bring the issue of their status under Section 10(l) here for review. In both the *Sears* and *The Los Angeles Herald Examiner* cases, no efforts by the charging parties to expedite proceedings at the lower judicial levels could succeed in bringing their cases to this Court prior to a "final adjudication of the Board". Nor is it likely that other charging parties will be able to do so either,—a natural and predictable consequence of the operation of a short-term order which by its nature expires too quickly to survive the steps of the appellate process.

---

4. Contrary to the Director's assertions in his Memorandum, the instant case is a particularly appropriate vehicle for the exercise of this Court's jurisdiction. This case presents the question of charging parties' status under Section 10(l) in its broadest terms, seeking a determination as to whether they may function thereunder as "parties" for all purposes not reserved to the Board under the statutory scheme. An adjudication of this issue here will, therefore, necessarily also determine the narrower or more limited questions concerning charging parties' rights which were raised in the other recent cases in which this Court granted certiorari but declined to reach the merits. *Sears, Roebuck and Co., supra,* (charging parties' right to appeal adverse district court decisions); *The Los Angeles Herald Examiner, supra* (their right to seek a stay of adverse district court decisions).

A decision which would achieve so much not merely to resolve past litigation, but to avoid similar future disputes, is hardly, as the Director claims, "of no practical consequence".

In the instant case, however, unlike both *Sears* and *Herald Examiner,* there has been no "final adjudication of the Board" and, moreover, the Board has stayed its consideration of the merits of the proposed unilateral settlement of the underlying agency proceeding pending the resolution by the Eighth Circuit of other related litigation. Accordingly, this case presents better credentials for review on the merits than either *Sears* or *Herald Examiner* and does so without the potential inhibiting factor of the Board's "final adjudication". Under these circumstances, if this case is not an appropriate vehicle for review, as the Director's Memorandum claims, then it is unlikely that the merits of the recurring issues presented here will ever receive this Court's attention.

Moreover, and contrary to the Board's assertions, the efficient functioning of the judicial process requires its operation in cases in which no immediate relief is required. In such cases the law serves as an instrument of preventive justice, quieting or stabilizing uncertain and disputed relationships, securing an adjudication of competing claims, and liquidating controversies which would otherwise result in future litigation. The justiciability or "consequence" of a resolution of the issues posed in this case, which resolution would achieve these ends, can be seen by analogy to actions for declaratory judgment in which no immediate relief is required or sought but which are justiciable by virtue of the fact that such actions similarly achieve these ends.[5] The fact that in suits for declaratory judgment it is known from the outset of the litigation that affirmative relief to one of the adverse parties is unnecessary, whereas here such relief may have become unnecessary during the course of the litigation, cannot, of itself, justify treating the actions differently when they

5. *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227; *Public Service Commission of Utah, et al.* v. *Wycoff Co., Inc.,* 344 U. S. 237, 242-3.

otherwise contribute equally to the welfare of the parties and the development of the law.

B. REPLY TO THE UNION'S OPPOSITION.

The Union's Opposition raises a single point with which the petition itself has not already dealt. The Union argues that since Section 10(l) refers to charged labor organizations as "a party to the suit" without making a similar reference to those who file the charges, that therefore Congress intended "party" status for the former but not for the latter. This rather simplistic analysis of the Section, which fails to take account of the scheme and purpose of the Act, also constitutes a misreading of the Section itself.

The only reference in Section 10(l) to the rights which any persons involved in the suit may exercise is contained in the following sentence:

> "Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony."

The statute does not distinguish between either the participatory role to be played by the charging and charged parties or the nature of the rights they may respectively exercise; these are the same for "*any* persons involved in the charge." It would appear to follow, therefore, that if the one constitutes a "party" to the proceedings then so must the other. The Union's view creates an anomaly in which the possession by two persons of identical rights results in one constituting a "party" and the other not entitled even to intervene in the suit.

A reading of that portion of the Section in which labor organizations are referred to as "parties" reveals that Congress was there devoting its attention not to creating a distinction between those who charge and those who are

charged, but rather to rendering them equally subject to the jurisdiction of the courts.

In the passage quoted above, Congress provided that whenever the Board filed its petition in a district court service of notice on *all* involved parties was required. Although this requirement would give rise to no confusion with respect to the observance of settled rules governing service on individuals or corporations, no such clarity existed with respect to the appropriate manner for effecting service on labor organizations. Accordingly, Congress incorporated in Section 10(l) a series of guidelines for making such service, thereby eliminating doubt as to the means for obtaining jurisdiction over labor organizations and for making any of them "a party to the suit". Thus, Congress' use of the latter phrase, if read in context, was intended only to render unions subject to judicial process *equally* with all other "persons" involved in the charge; its use cannot reasonably be construed as intending to create a distinction between those who file charges and those against whom they are filed with respect to the affirmative rights they may exercise or the status they possess under a statutory Section which in all other respects treats them without distinction.

CONCLUSION.

For all the reasons stated in petitioners' previously filed petition, together with those supplemented herein, the Court is urged to grant the instant petition for writ of certiorari.

Respectfully submitted,

GERALD C. SMETANA,
Attorney for Petitioner, Sears, Roebuck and Co.

JERRY KRONENBERG,
MURRAY F. BAHM,
Attorneys for Petitioners, Terminal Freight Cooperative Association and Terminal Freight Handling Company.

Of Counsel:
ALAN RAYWID,
LAWRENCE M. COHEN,
D. J. SULLIVAN,
GERALD TOCKMAN,